In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. [redacted] 51

CITY OF FRESNO,
Petitioner,
vs.
STATE OF CALIFORNIA, UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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The City of Fresno petitions for a Writ of Certiorari to review the judgment entered on March 31, 1961, by the United States Court of Appeals for the Ninth Circuit, as amended and explained by supplemental judgment entered by said Court on the 14th day of August, 1961.

I

OPINIONS BELOW

1. Opinions in the District Court.

The opinion and supplemental opinion of the District Court are reported as *Rank v. (Krug) United States* in 142 F.Supp. 1 to 198.

The same District Court rendered an earlier companion opinion, *Rank v. Krug,* 90 F.Supp. 773 (1950), on appellants' motion to strike covering many of the issues in *Rank v. (Krug) United States,* 142 F.Supp. 1 to 198 (1956). This earlier decision of the District Court is cited repeatedly by the District Court in its opinion in *Rank v. (Krug) United States,* 142 F.Supp. 1 to 198 and is cited with approval by this Court in *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 754,[1] 70 S.Ct. 955, 970, 94 L.Ed. 1231 (1950).

2. Opinions in the Court of Appeals.

The opinion of the Court of Appeals dated and entered March 31, 1961, as amended and explained by opinions of the Court of Appeals dated and entered August 14, 1961, has not as yet been reported and is printed in the Appendix infra, pages 1 and 48.

The Court of Appeals, on August 14, 1961, denied the petition of the City of Fresno for a rehearing and granted the petition for rehearing of the appellant,

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[1] "22. United States District Court, Southern District of California rendered a decision on April 12, 1950, in Rank v. Krug, 90 F. Supp. 773, consistent with the views we take of the issues here involved."

United States v. Gerlach Live Stock Co., 339 U.S. 725, 754, 70 S.Ct. 955, 970, 94 L.Ed. 1231 (1950).

State of California, and of certain appellant irrigation districts, but the Court of Appeals has as yet made no final determination on the rehearings so granted.

As stated in the Petition for Writ of Certiorari hereinbefore filed by the Solicitor General of the United States to review said decision of said Ninth Circuit Court of Appeals, entered March 31, 1961, as amended by decision of said Court entered August 14, 1961, (No. 366 in the Fall term, 1961, of this Court), due to the fact that the Court of Appeals has not made a final decision after granting the petitions for rehearing, the United States may ask to amend its Petition for Writ of Certiorari. Likewise, petitioner herein, the City of Fresno, may request to amend its Petition for Writ of Certiorari on the same ground, in the event the Court below modifies its said decisions.

II

JURISDICTION

The date of the judgment of the Circuit Court of Appeals for the Ninth Circuit sought to be reviewed and the date of its entry is March 31, 1961. This judgment is unreported but is set out in full at page 46 of the Appendix to this petition. This judgment of the Court below was amended by judgment dated and entered August 14, 1961, page 48 Appendix to this petition.

The United States was a party defendant in the District Court. The Court of Appeals dismissed the

United States as a defendant but in general sustained the District Court against the appellant Bureau of Reclamation officials. The appellant Bureau of Reclamation officials did not ask a rehearing in the Court of Appeals. By order of Mr. Justice Douglas of June 16, 1961, the time for filing a Petition for Writ of Certiorari by the appellant Bureau of Reclamation officials was extended to August 28, 1961.

On the 28th day of August, 1961, the appellant Bureau of Reclamation officials filed a Petition for Writ of Certiorari in this Court for a review of said opinion of the Ninth Circuit Court entered March 31, 1961, as amended by opinion of said Court entered August 14, 1961, which Petition for Writ of Certiorari is numbered No. 366 in the Fall term, 1961 of this Court.

The Petition of the City of Fresno, petitioner herein, for rehearing in the Court of Appeals was denied by the Court of Appeals on August 14, 1961. By order of Mr. Justice Douglas dated November 3, 1961, the time for the City of Fresno, petitioner herein, to file a Petition for Writ of Certiorari was extended to and including December 12, 1961.

The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

The basis for jurisdiction of the District Court was 28 U.S.C. 1442 (a) (3).

III

QUESTIONS PRESENTED FOR REVIEW

1. Whether the rate charged for water by the appellant Bureau of Reclamation officials from the Central Valley Project to petitioner, the City of Fresno, is unreasonable or reasonable is an administrative determination as ruled by the Court of Appeals or is a judicial determination as ruled by the District Court and particularly, whether the decision of the District Court that any charge to petitioner, the City of Fresno, for water in excess of $3.50 per acre-foot was unreasonable, was a judicial determination which should have been affirmed by the Court below.

2. Whether the determination of the limits of the authority of the administrative officers of the United States Bureau of Reclamation, as set by Congress, is an administrative determination as ruled by the Court below or is a judicial determination as ruled by the District Court and particularly, whether Congress, in authorizing the Central Valley Project for California, and providing water from said project for municipal and agricultural uses in six counties of California, namely Merced, Madera, Fresno, Tulare, Kings and Kern Counties, authorized the appellant Bureau officials to arbitrarily refuse, as an administrative determination, to sell badly needed water to the petitioner herein, the City of Fresno, where the city and county are admittedly in the service area of the Central Valley Project and were and are in an area of admittedly deficient water supply.

3. Whether, where the Basic Reclamation Act of June 17, 1902 (32 Stat. 388; 43 U.S.C. 391 et seq.) requires the Bureau of Reclamation to proceed in conformity to state laws relating to the control, appropriation, use or distribution of water including the laws of the State of California specifically requiring that no water may be exported by the Bureau of Reclamation from a California county or watershed in which water originates until a sufficient supply is reserved to meet the needs of such county and watershed of origin, and where Congress by specific legislation (63 Stat. 852, 853) has required the appellant Bureau of Reclamation officials to reserve sufficient water to satisfy the requirements of California counties and watersheds in which water originates in its operation of the Central Valley Project, before it is exported out of said counties and watersheds of origin elsewhere, the appellant Bureau of Reclamation officials can take percolating underground waters of the City of Fresno located in the county and watershed of origin of said waters, by condemnation or eminent domain for agricultural use in areas outside the county and watershed of origin.

4. Whether appellant can raise questions for the first time in their appeal briefs or in petitions for rehearing that were not designated in their designation of points on appeal as required by Rule 75(d) Federal Rules of Civil Procedure (28 U.S.C. 75(d)) and particularly whether appellant Bureau of Reclamation officials can raise for the first time the question of the validity of the District Court's decision that

any charge of the appellant Bureau of Reclamation officials in excess of $3.50 per acre-foot for municipal water from the Central Valley Project to petitioner, the City of Fresno, was unreasonable where no such point was set forth in appellant Bureau of Reclamation officials' designation of points on appeal, and where the Court below did find that the District Court's determination that any charge to petitioner, the City of Fresno, in excess of $3.50 per acre-foot for water was unreasonable was not sustained by the evidence.

5. Whether the Court of Appeals properly dismissed the United States as a party defendant after it had been joined as a defendant in this suit by the District Court under the Act of July 10, 1952 (66 Stat. 518, 560, Sec. 208 (a)).

6. Whether an appellant who has intervened in a case and asked for affirmative relief, can for the first time on a motion for rehearing after decision by a Court of Appeals, and without designating such right to a dismissal in its designation of points on appeal under Rule 75 (d), Federal Rules of Civil Procedure (28 U.S.C. 75 (d)), or in its appeal brief for the first time ask that it be dismissed from the action without costs.

IV

THE CONSTITUTIONAL PROVISIONS AND STATUTES AND REGULATIONS

1. *Acts of Congress.*
   (a) Act of December 5, 1924 (43 Stat. 672, 702; Section 4, Subsection B)
   (b) Act of June 17, 1902 (32 Stat. 388; 43 U.S.C. 391 et seq.)
   (c) Act of August 26, 1937 (50 Stat. 844)
   (d) Reauthorization Act of October 13, 1949 (63 Stat. 852, 853)
   (e) Act of July 10, 1952 (66 Stat. 518, 560, Sec. 208, Subsection (a))
   (f) Federal Rules of Civil Procedure (28 U.S.C.) Rule 75 (d)
   (g) Federal Rules of Civil Procedure (28 U.S.C.) Rule 75(i)
   (h) 28 U.S.C. 1254 (l)
   (i) 28 U.S.C. 1442 (a) (3)
2. *Federal Regulations.*
   (a) Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935. (Issued in accordance with the Act of December 5, 1924 (43 Stat. 672, 702, Section 4, Subsection B), see Appendix, page 53, infra.)
3. *State of California Constitution and Statutes.*
   (a) California Constitution, Article XIV, Sec. 3.
   (b) California Water Code Sections: 104, 106, 1254, 1460, 10500, 10504, 10505, 11128, 11460, 11463.

V

STATEMENT

This case involves the United States Bureau of Reclamation's Central Valley Project in California and the efforts of petitioner, the City of Fresno, to protect and enforce its rights to water from the Central Valley Project specifically granted to it by the Congress of the United States under that project.

1. History of Present Litigation.

This case involves the efforts of the City of Fresno, California, and a group of farmers owning riparian and percolating water rights along a thirty-eight mile stretch of the San Joaquin River between Friant Dam and Gravelly Ford Canal in Fresno and Madera Counties, California, to obtain the water to which they are entitled out of the United States Bureau of Reclamation's Central Valley Project in California.

Among other defendants in the District Court were the United States, the defendant Bureau of Reclamation officials and some fifteen irrigation districts supplied with San Joaquin River water out of the Central Valley Project.

The District Court granted the farmers an injunctive judgment by decreeing what is known in California as a "physical solution".[2] This decree of physical solution ordered the appellant Bureau of Reclamation officials either to allow the full natural flow of the San Joaquin River below Friant Dam or in the alterna-

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[2] *City of Lodi v. East Bay Municipal Utility District*, 7 Cal. 2d 316, 345, 60 P. 2d 439, 452 (1936).

tive, to reduce the flow to a minimum and to supply the farmers riparian and percolating water rights by construction of ten check dams in the thirty-eight mile stretch of the San Joaquin River in order to pond the water in the River and give the farmers a substitute riparian and percolating water supply in place of what they had before the appellant Bureau of Reclamation diverted most of the natural flow of the San Joaquin River past their lands by means of Friant Dam and the Madera and Friant-Kern Canals of the Central Valley Project. The Court below sustained the District Court's plan of physical solution and held that these riparian and underground percolating water rights of these farmers had not been taken by eminent domain.

The City of Fresno is in the county and watershed of the San Joaquin River and obtains its water supply partly from wells pumping from underground percolating waters seeping from the San Joaquin River below Friant Dam.

The District Court decreed that the City of Fresno had overlying percolating water rights to water seeping from the San Joaquin River. The District Court also held that the City needed and was entitled to a supplemental supply of surface water out of the Bureau of Reclamation's Central Valley Project at a rate not to exceed $3.50 per acre-foot and that the appellant Bureau of Reclamation officials' charge of $10.00 per acre-foot for water out of the Central Valley Project was unreasonable.

The Court below sustained the District Court's finding that the City of Fresno had underground percolating water rights but ruled that these rights of the City of Fresno could be taken by the appellant Bureau of Reclamation officials by eminent domain or condemnation. The Court below also reversed the District Court's ruling that the City of Fresno was entitled to a supplemental supply of water out of the Central Valley Project at not to exceed $3.50 per acre-foot, holding that the determination of whether the City of Fresno was in the service area of the Central Valley Project as provided by Congress was an administrative and not a judicial decision and that the determination of whether a rate for water in excess of $3.50 per acre-foot was reasonable or unreasonable was also an administrative and not a judicial decision and that the fixing of rates for water out of the Central Valley Project was beyond the power of the Courts to control. The Court below also dismissed the suit as against the United States but sustained the action against the appellant Bureau of Reclamation officials.

The City of Fresno though agreeing with many parts of the opinion of the Court below, however, now petitions this Court for a Writ of Certiorari directed to the Circuit Court of Appeals to review the decree of the Court below on the above important points.

The appellant Bureau of Reclamation officials have already filed a petition for Writ of Certiorari with this Court to review the decision of the Court below. (No. 366, October Term, 1961.)

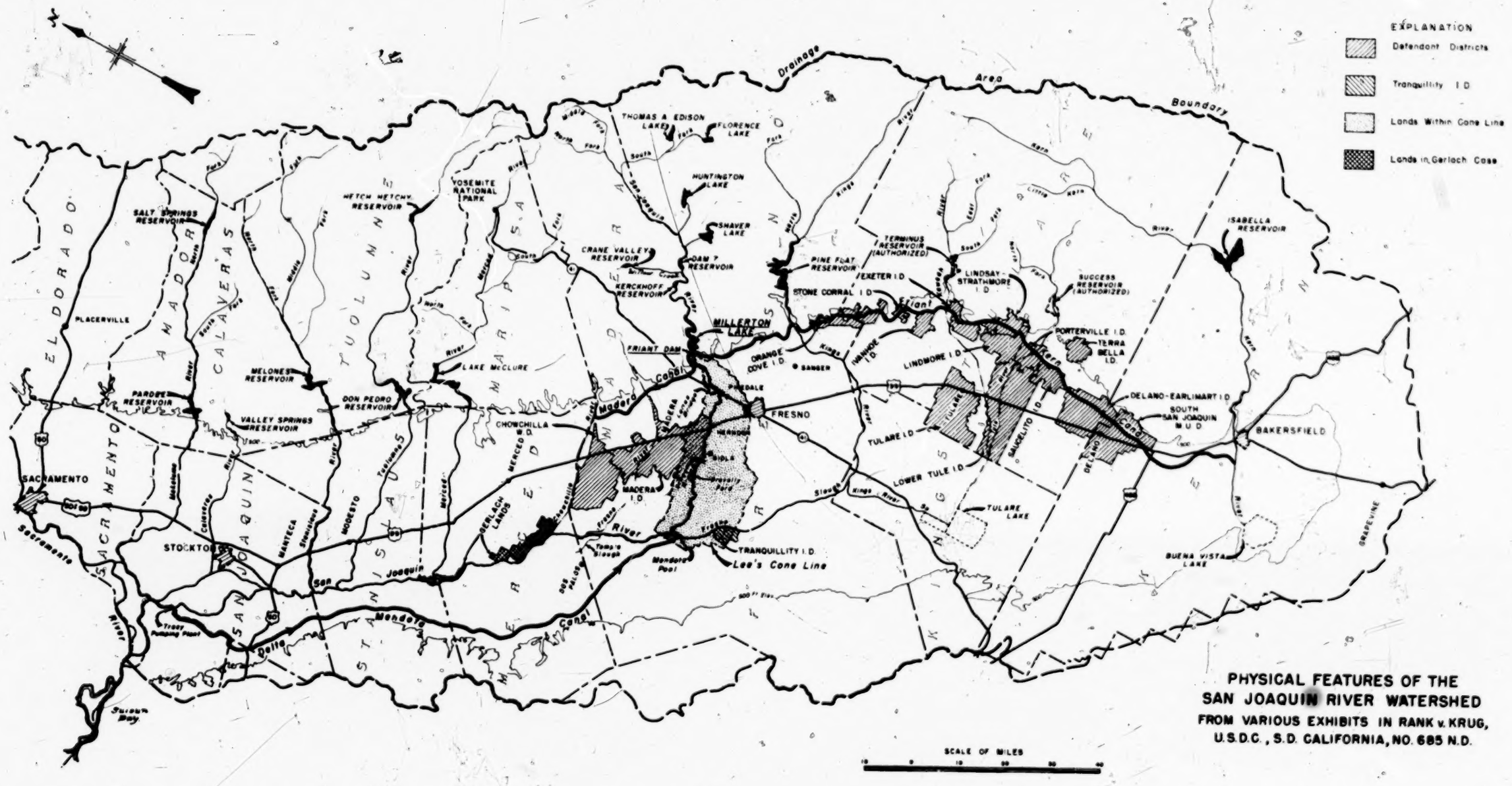
2. Location of the Central Valley Project and the Lands of the Litigants.

At pages 39, 40 and 41 of *Rank v. Krug,* 142 F. Supp. 1, there is an excellent map showing the main features of the Central Valley Project in the area involved in this litigation including Friant Dam, the Delta-Mendota Canal, the Friant-Kern Canal, the Madera-Kern Canal, the areas of percolating water supplied by the San Joaquin River referred to on said map as "Lee's Cone Line", the City of Fresno, the lands of the original plaintiffs, and the lands of all of the defendant irrigation districts in the present action. ***This map is reprinted for the convenience of this Court on the page opposite.***

3. The Central Valley Project.

The Bureau of Reclamation's Central Valley Project in California has been described in the decisions of this Court in *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, in *Rank v. (Krug) United States,* 142 F.Supp. 1, and in *Rank v. Krug,* 90 F.Supp. 773, cited with approval by this Court in *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

As this Court stated in its two opinions, supra, the Central Valley of California is a valley 400 miles long and 100 miles wide. The northern portion of the valley has an excess of rainfall and is drained by the Sacramento River. The southern portion of the valley which includes the City and County of Fresno, is arid, lacks water and is drained by the San Joaquin River.



PHYSICAL FEATURES OF THE SAN JOAQUIN RIVER WATERSHED

FROM VARIOUS EXHIBITS IN RANK v. KRUG, U.S.D.C., S.D. CALIFORNIA, NO. 685 N.D.

As also stated by this Court, the Central Valley Project "is a gigantic undertaking to *redistribute* principal fresh water resources of California".[3]

The Central Valley Project has several added incidental features such as Folsom Dam on the American River and Trinity Dam on the Trinity River of California. However, briefly stated the primary purpose of the Central Valley Project as authorized by Congress was, and still is, a project to take water from the water-rich northern part of the Central Valley of California and redistribute it to existing municipalities and counties in the southern portion of the Central Valley, including the City of Fresno, and to furnish a supplemental irrigation water supply to the following six counties in the San Joaquin Valley, namely, Merced County, Madera County, *Fresno County,* Tulare County, Kings County and Kern County.

[3] *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728, 70 S.Ct. 955, 94 L.Ed. 1231 (1950).

4. Legislative History of the Central Valley Project.

Section 4 of the Act of Congress of December 5, 1924 (43 Stat. 672, 702, Sec. 4 (B)), provides that no irrigation project should be constructed under the Basic Reclamation Act of June 17, 1902 (32 Stat. 388) until the reclamation project had been set forth in detail.

> "That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes and that it will probably return the cost thereof to the United States."
>
> Act of December 5, 1924 (43 Stat. 672, 702, Section 4, Subsection B).

Pursuant to said Act of December 5, 1924, hereinabove referred to, Secretary Ickes submitted to President Roosevelt the Feasibility Report on the Central Valley Project and on December 2, 1935, President Roosevelt officially approved the same, thereby determining the basic features of the Central Valley Project.

That the Feasibility Report by the President dated December 2, 1935, is the basis and continued to be the basis of the Central Valley Project as authorized and reauthorized by Congress, appears from the decision

of this Court in *United States v. Gerlach Live Stock Co.*, supra.[4]

The Feasibility Report specifically provided that the water from Friant Dam, one of the principal features of the Central Valley Project, was to serve "*developed,* irrigated lands" in the counties of Merced, Madera, *Fresno;* Tulare, Kings and Kern, including the City of Fresno.[5]

The Feasibility Report also specifically provided that the Central Valley Project was to furnish a supplemental water supply for "*existing municipal* de-

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[4]"But it also is true, as pointed out by the claimants, that in these Acts Congress expressly 'reauthorized' a project already initiated by President Roosevelt who, on September 10, 1935, made allotment of funds for construction of Friant Dam and canals under the Federal Emergency Relief Appropriation Act, 49 Stat. 115, 118, Section 4, and provided that they 'shall be reimbursable in accordance with the reclamation laws'. A finding of feasibility, as required by law was made by the Secretary of the Interior on November 26, 1935, making no reference to navigation, and his recommendation of 'the Central Valley development as a Federal reclamation project' was approved by the President on December 2, 1935."

United States v. Gerlach Live Stock Co., 339 U.S. 725, 70 S.Ct. 955, 958-959, 94 L.Ed. 1231 (1950).

[5]"Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve *developed* irrigated lands in an area extending from Madera County on the north to Kern County on the south." (Emphasis ours.)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935.

"Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land non-riparian to the river, situated both to the north and south of Friant in the counties of *Madera, Merced, Fresno, Tulare, Kings and Kern* in the State of California." (Emphasis ours.)

Gerlach Live Stock Co. v. United States, 111 Ct.Cls. 1 at 27, Aff. 339 U.S. 725 (1950), 70 S.Ct. 955, 94 L.Ed. 1231.

velopments"[6] which, of course, would include the petitioner, the City of Fresno.[7]

And finally, and what is most important, *the Central Valley Project was not designed to bring new lands into cultivation.*

> *"The project is not designed for bringing new lands into cultivation,* but for the maintenance of existing agricultural development and existing civilization of high type." (Emphasis ours.)
>
> Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935.

After the determination of the limits of Central Valley Project on December 2, 1935, by President

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[6]"The Central Valley Project embodies a plan • • • to provide urgently needed water supplied for *existing* • • • municipal developments in the Sacramento and San Joaquin Valleys and upper San Francisco Bay Region • • •." (Emphasis ours.)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt December 2, 1935.

"The Central Valley basin development • • • includes • • • water • • • for *municipal* and miscellaneous purposes including *cities* • • •." (Emphasis ours.)

United States v. Gerlach Live Stock Co., 339 U.S. 725, 733, 70 S.Ct. 955 (1950), 94 L.Ed. 1231.

"The object of the plan is to arrest the flow and regulate its seasonal and year to year variations thereby creating salinity control to avoid the gradual encroachment of ocean water, providing an adequate supply • • • for *municipal* and irrigation purposes." (Emphasis ours.)

Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 78 S.Ct. 1174 (1958), 2 L.Ed. 2d 1313.

[7]"Both the City of Fresno and the Fresno Irrigation District are, and always have been, since the formation of general plans for the Central Valley Project, fairly within the service area of the Central Valley Project."

State Water Rights Board of the State of California, Decision No. D 935, Adopted June 2, 1959, p. 68.

Roosevelt, Congress as stated thereafter specifically provided that the Central Valley Project should be *constructed and operated* in accordance with the Basic Reclamation Law of June 17, 1902[8] (originally signed by President Theodore "Teddy" Roosevelt) (43 U.S.C. 391, 411), which specifically provides that in the construction and operation by the Bureau of Reclamation, *all* state laws on waters must be obeyed and all existing *water rights must be respected* and protected by the government officials.[9]

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[8]Act of August 26, 1937 (50 Stat. 844, 850), page 62 Appendix, infra.

"A finding of feasibility, as required by law was made by the Secretary of the Interior on November 26, 1935, making no reference to navigation, and his recommendation of 'the Central Valley development as a Federal reclamation project' was approved by the President on December 2, 1935."

United States v. Gerlach Live Stock Co., 339 U.S. 725, 70 S.Ct. 955, 958-959, 94 L.Ed. 1231 (1950).

[9]"Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the *Secretary of the Interior*, in carrying out the provisions of this Act, shall proceed in conformity with such laws. • • •" (Emphasis ours.)

Act of June 17, 1902 (32 Stat. 388, 390, 43 U.S.C. 391).

"Sec. 8 of the Reclamation Act, 43 U.S.C.A. 383, 392, provided: 'That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, *use* or distribution of water used in irrigation or any vested right acquired thereunder and the *Secretary of the Interior in carrying out the provisions of this Act shall proceed in conformity with such laws*' • • •.

"We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes." (Emphasis ours.)

State of Nebraska v. State of Wyoming, 325 U.S. 589, 612, 65 S.Ct. 1332, 1348.

California law specifically provides *that the State* of California shall determine what water of the state can be converted to public use and that domestic use of water is the highest use of water in the state. California Water Code Sections 104, 106, 1254, Appendix pages 66 and 69.

California law also specifically provides that no water should be taken from the county and watershed where such water originates until the needs of such county and watershed of origin have been fully supplied, (California Water Code Section 11460, Appendix page 66) and that these limitations shall apply to the Federal Government in its operation of the Central Valley Project, (California Water Code Section 11128, Appendix page 68, infra) and finally Congress itself specifically provided that in the operation of the Central Valley Project that the Bureau of Reclamation should recognize and follow all California county of origin and watershed or origin laws not only for their present but their future needs.

> "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, . . .
>
> ". . . the Secretary of the Interior shall make recommendations for the *use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs.*" (Emphasis ours.)
>
> Reauthorization Act of October 13, 1949 (63 Stat. 852, 853), Appendix page 64, infra.

Friant Dam was completed (with the exception of some drum gates not included in the original plans) and placed in actual operation on August 4, 1944. At this time water was first turned into one of the main canals for use. The City of Fresno was looking forward to a supplemental supply of water out of Friant Dam at reasonable rates.

5. The Era of Boke and Strauss.

Everything was going fine with the construction and operation of the Central Valley Project under the same great engineers of the Bureau who had constructed Hoover Dam, Bonneville Dam and the other great reclamation projects. The City of Fresno was relying on the promises of these outstanding men and the acts of Congress guaranteeing them water from the Central Valley Project. Then shortly after the first water was delivered under the Central Valley Project in 1944, to the City's great dismay, two incompetent and inexperienced men, who were not engineers nor administrators, were installed as Chief of the Bureau of Reclamation and Regional Director of the Central Valley Project in California, and captured control of the great Bureau of Reclamation. These men, in violation of the original Feasibility Report covering the Central Valley Project and in violation of every act of Congress and the interpretations thereof by the federal courts, shortly after their appointment, began a consistent refusal to recognize the City of Fresno's rights to the water it was entitled to under the Central Valley Project as approved by Congress.

In our discussion of Boke and Strauss we are not attacking these men personally but simply want to point out that they were too inexperienced and unqualified to even begin to handle their respective jobs or to appreciate the magnificent group of engineers they headed, nor could they understand the will of Congress in regard to the Central Valley Project.

Immediately upon his employment as Chief of the Bureau of Reclamation, Strauss asked most of the great engineers of the Bureau of Reclamation, like Bashore who had constructed the Central Valley Project, and other great engineers of the Bureau of Reclamation, who had constructed Hoover and Bonneville Dames, to get out.[10]

Boke, the Regional Director of the Bureau of Reclamation for California, was not an engineer and a Congressional committee found that he did not have the qualifications to administer the Central Valley Project.[11]

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[10] "Mr. Hodson. Yes; there has been a very quiet but nonetheless bitter controversy raging within the Bureau ever since • • • between the so-called old-time career Bureau people and on their ideas of what the Bureau is supposed to be doing, and the new group which has taken over control and management of the Bureau • • • Mr. Comstock talked to Mr. Bashore in Denver. He said that he was called into the office and given his choice to retire or be *kicked out*—so he retired—and the reasons were he would not go along on this new thinking and these new plans that the Bureau was putting into effect." (Emphasis ours.)

Investigation of the Bureau of Reclamation, Dept. of the Interior, in the Executive Depts. House of Representatives, 80th Congress, 2nd Session, page 746.

[11] "• • • your committee has reached the conclusions, based on incontrovertible evidence, Mr. Boke does not possess the qualifications necessary to administer the gigantic Central Valley Project."

Investigation of the Bureau of Reclamation, Dept. of the Interior, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 10 (Aug. 4, 1948).

The old Bureau engineers who had successfully designed and constructed the Central Valley Project, Boulder Dam and the other great reclamation projects testified under oath that Strauss had completely wrecked the Bureau's great staff.[12]

Strauss, Chief of the Bureau of Reclamation, was equally criticized by Congress.[13]

While the City of Fresno was attempting to get the water to which it was entitled from the Central Valley Project under the acts of Congress, Strauss, himself, due to his continual violation of the mandates of Congress, admitted that Congress no longer trusted either him, Boke, nor the Secretary of the Interior.

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[12] "Mr. Blanks. • • •. Throughout the period of reclamation history, there has been built up the greatest engineering organization the world has known. It is world-renowned. It is something that the people of this country can well be proud of. It is something that all of us have been proud to be connected with. The engineering organization under the present administration of the Bureau of Reclamation has been wrecked, practically wrecked. • • •."

Investigation of the Bureau of Reclamation, Dept. of the Interior, before the Committee on Expenditures, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 699.

[13] "Referring to Mike Strauss, Chief of the Bureau of Reclamation over Boke: 'Senator Downey: Mike Strauss: Succeeding Bashore, he stepped down from a higher position so that he could enforce his will more directly. As ignorant of engineering, irrigation, and western conditions as any man could be, with no important administrative experience behind his entry into the government service, Mr. Strauss represents the zealot, the politician, the idealogist who lives by the manipulation of propaganda, freely dispatched at public cost; who cares nothing for the truth except how best to obscure it'."

Investigation of the Bureau of Reclamation, Dept. of the Interior, before the Committee on Expenditures, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 140.

"At the same Salt Lake City Conference (1947) Secretary Krug made the following statements: 'This program is probably closer to my heart than any other in the Department of the Interior and as Mike (Michael Strauss, Commissioner of the Bureau of Reclamation) pointed out to you, for some strange reason *people up in Congress don't trust us like they used to.* * * *'" (Emphasis ours.)

Investigation of the Bureau of Reclamation, 19th Intermediate Report of the Committee on Expenditures in the Executive Dept. August 7, 1948, House Report No. 2458, pp. 555-556.

When Boke took over, he had an argument with some Fresno County officials. Thereafter he refused to act on any application from anyone in the County of Fresno, including the City of Fresno, for water from the Central Valley Project and illegally began the deliberate exclusion of the City of Fresno and the County of Fresno from any benefits from the Central Valley Project in direct violation of the will of Congress. The maps of the Bureau of Reclamation thereafter show the City and County of Fresno to be completely excluded from the Central Valley Project.

Acting under the illegal recommendations of Boke and Strauss the then Acting Secretary of the Interior Chapman, at the insistence of Boke and Strauss, illegally and without authority of Congress, blandly announced in a letter dated February 24, 1947 that he was taking from the San Joaquin River between

Friant Dam and Gravelly Ford Canal, a large portion of this vitally needed water from Fresno City and County, which water, under the original Feasibility Report of President Roosevelt, approved by Congress was only to be used as a supplemental supply, *to illegally supply an additional 338,000 acres of dry, uncultivated, and unirrigated land not intended to be supplied by water from the Central Valley Project under the original Feasibility Report nor by the acts of Congress authorizing and reauthorizing the project.*[14]

Boke thereafter negotiated and signed contracts with fifteen appellant irrigation and water districts[15] in an abortive attempt to use up all of the water of the Central Valley Project and thus *illegally exclude the City and County of Fresno* from obtaining the

[14] "Millerton Lake will also provide 1,256,500 acre-feet (Class I and II) to the upper (southern) San Joaquin Valley as a supply for approximately *338,000 acres of presently dry land* • • •." (Emphasis ours.)
Plaintiffs' Exhibit 136.

[15]

Districts	Date of Contract with Bureau
Delano-Earlimart	8/11/51
Exeter	11/ 8/50
Ivanhoe	9/23/50
Lindmore	2/29/49
Lindsay-Strathmore	8/ 5/48
Lower Tule	5/ 1/51
Orange Cove	5/20/49
Porterville	1/28/52
Saucelito	2/13/51
S.S.J.M.U.D.	10/18/45
Stone Corrall	12/13/50
Terra Bella	10/12/50
Tulare	10/18/50
Chowchilla	7/ 5/50
Madera	5/14/51

Rank v. Krug, 142 F.Supp. 1, 137 (1956).

supply of vitally needed water to which they were entitled under the acts of Congress. We respectfully ask this Court to look at the official map of the Bureau of Reclamation on the page opposite, conclusively proving that the appellant officials of the Bureau of Reclamation intended to illegally exclude not only the petitioner, the City of Fresno, but the entire County of Fresno from participation in the Central Valley Project *in spite of the ruling of the State of California agency in charge of appropriations of water*[16] *and of this Court*[17] *that Fresno County and petitioner, the City of Fresno, are in the service area of this project as defined by Congress.*

6. The City of Fresno.

Petitioner, the City of Fresno, is the capital of Fresno County. According to the United States Department of Agriculture, Fresno County is the greatest producer of agricultural crops of any county in the United States. For a number of years the United States Department of Agriculture has listed Fresno

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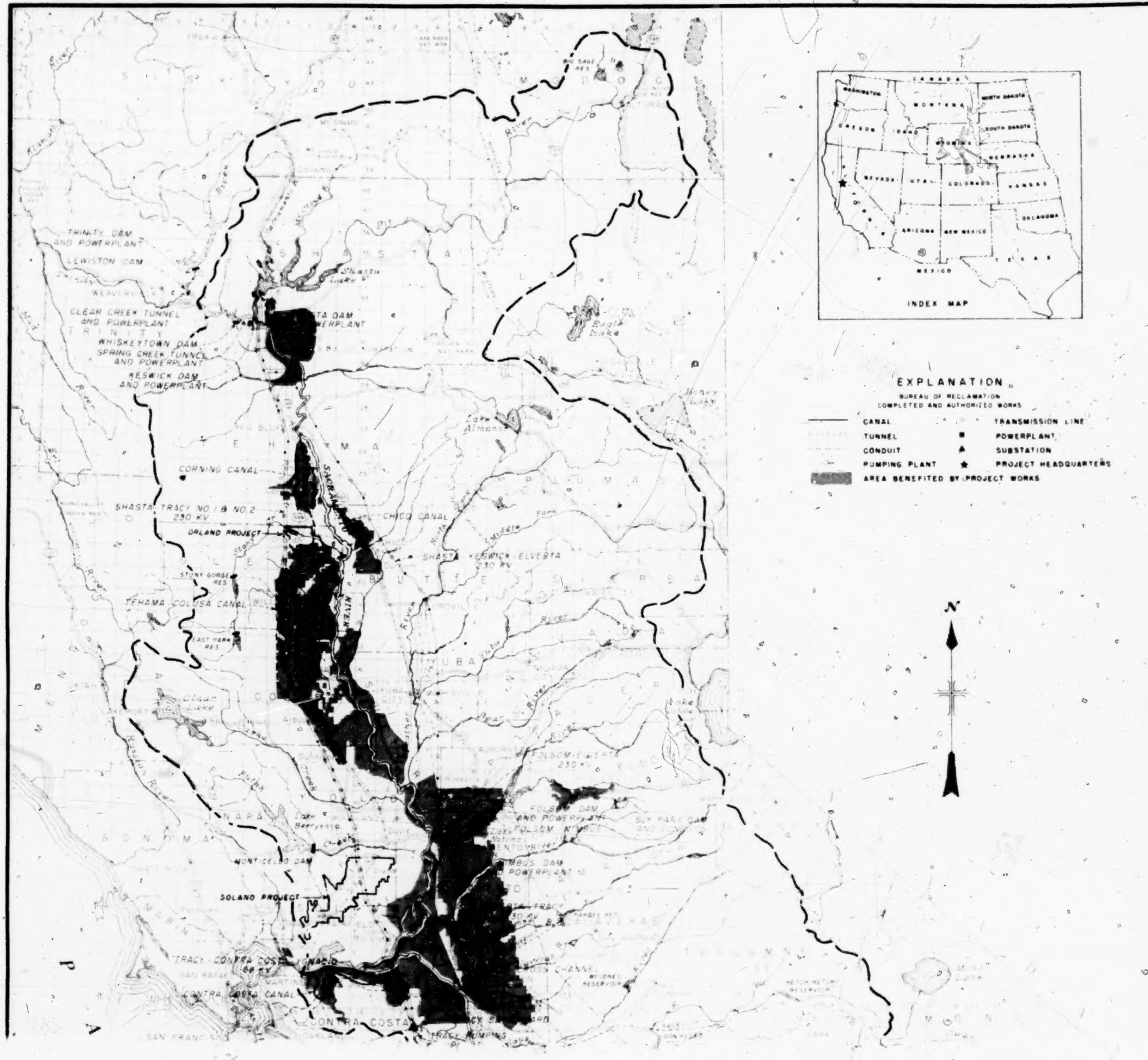
[16] "Both the City of Fresno and the Fresno Irrigation District are, and always have been, since the formulation of general plans for the Central Valley Project, fairly within the service area of the Central Valley Project."

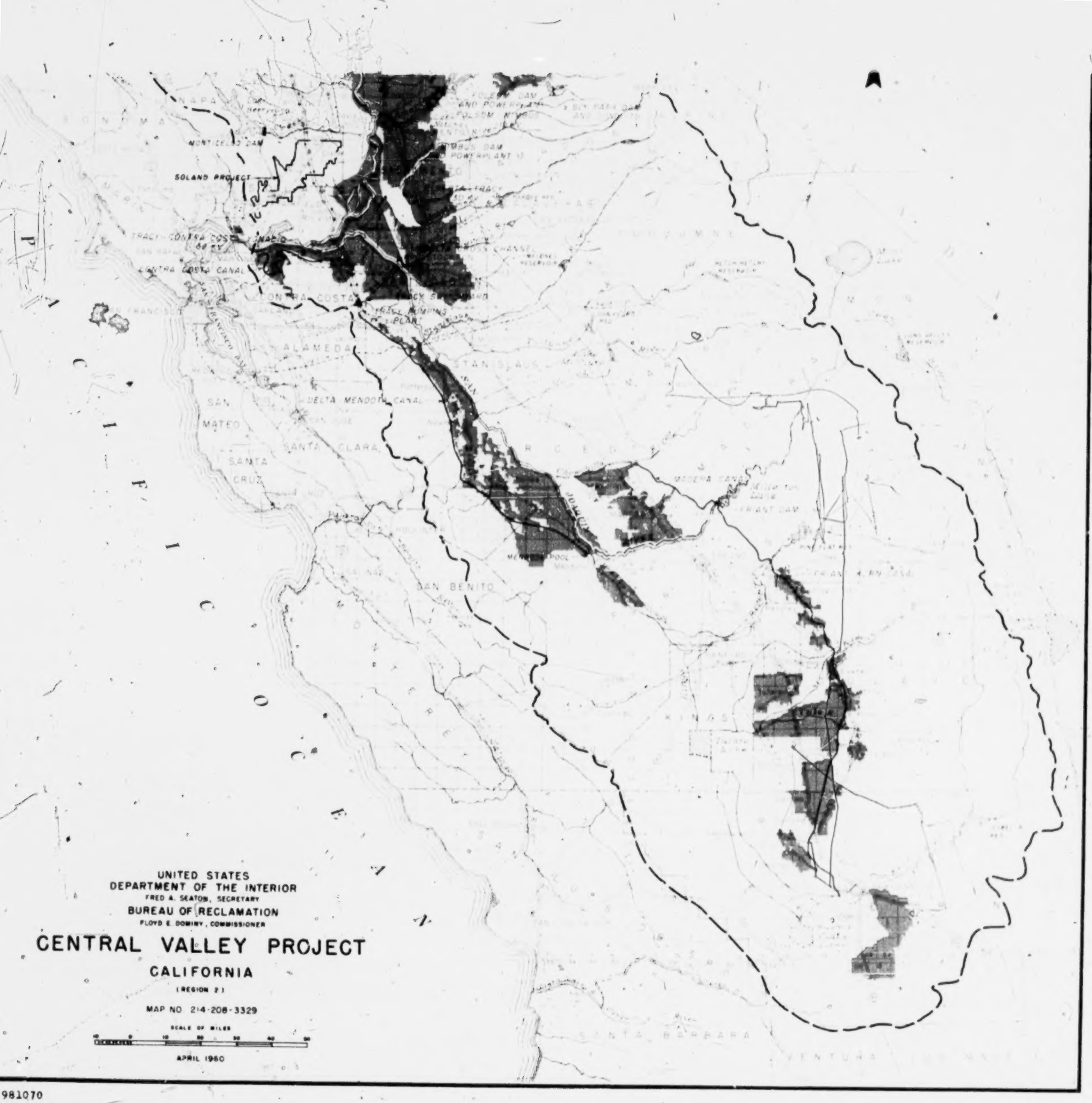
State Water Rights Board of the State of California, Decision No. D 935, Adopted June 2, 1959, p. 68.

[17] "Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land non-riparian to the river, situated both to the north and south of Friant in the counties of *Madera, Merced, Fresno, Tulare, Kings and Kern* in the State of California." (Emphasis ours.)

Gerlach Live Stock Co. v. United States, 111 Ct.Cls. 1 at 27, Aff. 339 U.S. 725 (1950), 70 S.Ct. 955, 94 L.Ed. 1231.



TRINITY DAM AND POWERPLANT
LEWISTON DAM
CLEAR CREEK TUNNEL AND POWERPLANT
WHISKEYTOWN DAM
SPRING CREEK TUNNEL AND POWERPLANT
KESWICK DAM AND POWERPLANT
Shasta Lake
Eagle Lake
Lake Almanor
Honey Lake
CORNING CANAL
SHASTA-TRACY NO. 1 & NO. 2 230 KV
ORLAND PROJECT
CHICO CANAL
SHASTA-KESWICK-ELVERTA 230 KV
STONY GORGE RES
TEHAMA-COLUSA CANAL
EAST PARK RES
Clear Lake
FOLSOM-ELVERTA 230 KV
FOLSOM DAM AND POWERPLANT
NIMBUS DAM POWERPLANT
Lake Berryessa
MONTICELLO DAM
SOLANO PROJECT
TRACY-CONTRA COSTA-YGNACIO 69 KV
CONTRA COSTA CANAL
CONTRA COSTA
TRACY PUMPING PLANT
SACRAMENTO RIVER
SHASTA
TEHAMA
BUTTE
SIERRA
YUBA
NAPA
SONOMA
MARIN
CALAVERAS
TRINITY
LASSEN
PLUMAS
MODOC
INDEX MAP
CANADA
WASHINGTON
MONTANA
NORTH DAKOTA
OREGON
IDAHO
WYOMING
SOUTH DAKOTA
NEBRASKA
NEVADA
UTAH
COLORADO
KANSAS
OKLAHOMA
ARIZONA
NEW MEXICO
TEXAS
MEXICO
EXPLANATION
BUREAU OF RECLAMATION
COMPLETED AND AUTHORIZED WORKS
CANAL
TUNNEL
CONDUIT
PUMPING PLANT
AREA BENEFITED BY PROJECT WORKS
TRANSMISSION LINE
POWERPLANT
SUBSTATION
PROJECT HEADQUARTERS
N



UNITED STATES
DEPARTMENT OF THE INTERIOR
FRED A. SEATON, SECRETARY
BUREAU OF RECLAMATION
FLOYD E. DOMINY, COMMISSIONER

CENTRAL VALLEY PROJECT

CALIFORNIA

(REGION 2)

MAP NO 214-208-3329

SCALE OF MILES

APRIL 1960

981070

FACTUAL DATA ON THE CENTRAL VALLEY PROJECT

California's vast Central Valley Reclamation Project, extending 500 miles from the Cascade Range in the north, to the semiarid but fertile plains along the Kern River in the south, is a major water conservation development.

The initial features of the project were built primarily to protect the rich Central Valley from crippling water shortages. New project units now are being built to provide water and power to match the continued growth of the State, and still other additions are being planned for the future.

Features of the project now in operation or under construction will bring irrigation water to 1,300,000 acres of land, much of which already is under cultivation. Its powerplants will provide a capacity of 862,500 kilowatts to meet rapidly growing farm, industrial, and domestic power demands.

Although primarily an irrigation development, the multiple-purpose Central Valley Project also provides flood control and improvement of Sacramento River navigation, supplies domestic and industrial water, generates electric power, conserves fish and wildlife, creates opportunities for recreation, repulses saline ocean waters from the Sacramento-San Joaquin River Delta, and serves other water uses. Shasta Dam began storing water on January 1, 1944 but the project did not become a fully integrated operation until the summer of 1951.

WATER SUPPLY

THE CENTRAL VALLEY BASIN comprises two major watersheds, that of the Sacramento River on the north and the San Joaquin River on the south. The combined watersheds extend nearly 500 miles in a northwest-southeast direction, and average about 120 miles in width. The basin is entirely surrounded by mountains except for a gap in its western edge. The valley floor occupies about one-third of the basin, the other two-thirds being mountainous; the Cascade Range and Sierra Nevada on the east rising to above 14,000 feet in elevation and the Coast Range on the west to as high as 8,000 feet. The Sacramento River with its tributaries flows southward and drains the northern part of the basin. The San Joaquin River with its tributaries flows northward and drains the central southern portion, the extreme southern portion being a closed basin. These two river systems join in the Sacramento-San Joaquin Delta where they flow through Suisun Bay and Carquinez Straits into San Francisco Bay and thence out the Golden Gate to the Pacific Ocean. The average annual runoff of the basin for the 40-year period beginning 1903-04 was 33,000,000 acre-feet, and for the critical seven-year period 1927-28 to 1933-34 inclusive it was 18,400,000 acre-feet. The average annual runoff in acre-feet at the three major dams of the Central Valley Project is as follows:

Dam	Stream	40-year average 1903-4 to 1942-3	7-year average 1927-28 to 1933-4
Shasta	Sacramento	5,725,000	3,537,000
Friant	San Joaquin	1,820,000	1,060,000
Folsom	American	2,750,000	1,550,000

FEATURES OF THE PROJECT PLAN

SHASTA DAM on the Sacramento River, below a drainage area of 6,600 square miles and with a storage of 4,500,000 acre-feet of water, regulates floods and stores the surplus winter runoff for many uses including irrigation in the Sacramento Valley; maintenance of navigation flows in the Sacramento River; conservation of fish life in the Sacramento River, protection of the Sacramento-San Joaquin Delta from intrusion of saline ocean water, transfer of water to Mendota Pool via Delta-Mendota Canal in exchange for San Joaquin River water diverted by Friant Dam, provision of water for municipal, and industrial as well as irrigation use in the Contra Costa area, and generation of hydroelectric energy. The dam is a curved concrete gravity type structure, with a height of 602 feet above the bottom of the foundation, and a crest length of 3,460 feet.

SHASTA POWERPLANT is located just below the Shasta Dam. Water from the dam is released through five River water is transferred a distance of about 30 miles across the Delta to furnish an irrigation supply to the Tracy pumps for the Delta-Mendota Canal. It also improves irrigation supplies in the Delta and helps repulse ocean salinity.

CONTRA COSTA CANAL extends westerly along the south shore of Suisun Bay to Martinez and carries water from the Delta for municipal, industrial, and irrigation use. The system includes an intake structure on Rock Slough, four pumping plants, secondary canals and Martinez Reservoir at the terminal. The main canal is 48 miles long, has a maximum top width of 30 feet, a maximum bottom width of 7 feet, a water depth of over 7 feet, and an intake capacity of 350 cubic feet per second.

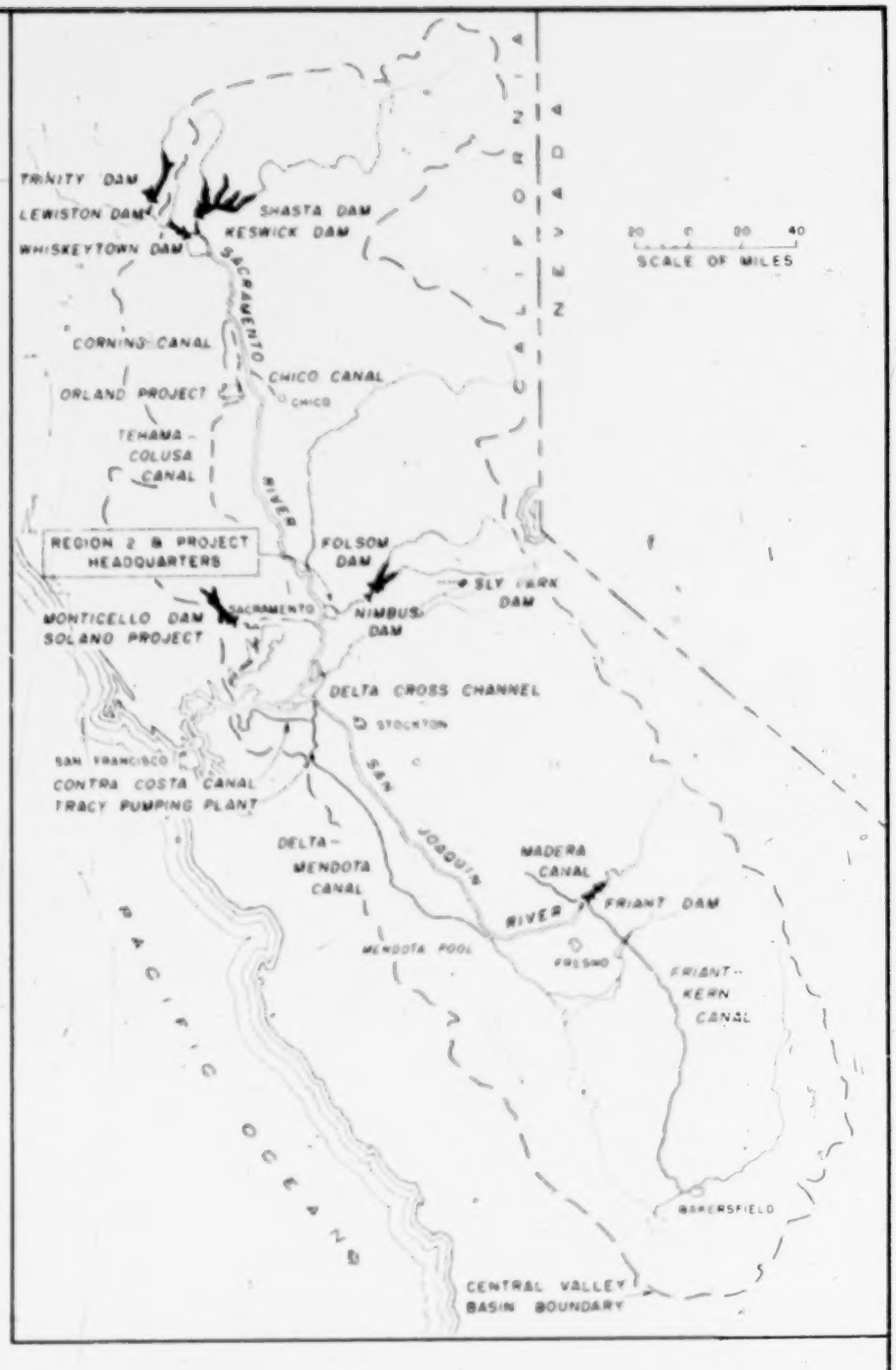
TRACY PUMPING PLANT consists of an inlet channel, pumping plant, and discharge pipes where water in the Delta, which has been released from storage in Shasta and Folsom Reservoirs or has entered the Sacramento River System below these reservoirs, is lifted 196 feet into the Delta-Mendota Canal. Each of its six pumps is powered by a 22,500 horsepower electric motor, and is capable of pumping at the rate of 767 cubic feet per second. Power to run the huge pumps is supplied by Shasta, Keswick, Folsom, and Nimbus Powerplants. The water is pumped through three 15-foot diameter discharge pipes which carry it about one mile up an inclined grade to the Delta-Mendota Canal. In the intake canal the Tracy Fish Screen has been built to intercept downstream migrant fish so they may be returned to the main channel to resume their journey to the ocean.

DELTA-MENDOTA CANAL carries water discharged by the Tracy Pumping Plant along the west side of San Joaquin Valley for a distance of 113 miles to Mendota Pool on the San Joaquin River, for use on croplands previously irrigated by diversions from the natural flow of San Joaquin River. The San Joaquin flows, thus replaced with Delta waters via the Delta-Mendota Canal, are stored in Millerton Lake behind Friant Dam and diverted north through the Madera Canal and south through the Friant-Kern Canal for use on the east side of the southern San Joaquin Valley. Delta-Mendota Canal has an intake capacity of 4,600 cubic feet per second, a maximum top width of 101 feet, maximum bottom width of 48 feet and water depth of 16 feet with lining freeboard of 1.5 feet. The terminal capacity at Mendota Pool is 3,200 cubic feet per second.

FRIANT DAM AND MILLERTON LAKE on the San Joaquin River, below a drainage area of 1,630 square miles, has a capacity of 521,000 acre-feet. It controls San Joaquin River flows and provides downstream releases to meet requirements above Mendota Pool and provides conservation storage and diversion into Madera and Friant-Kern Canals. The dam is a straight concrete gravity type structure 319 feet in height with a crest length of 3,488 feet.

MADERA CANAL with headworks located in the right abutment of Friant Dam carries water northerly to furnish new and supplemental supplies to lands in Madera County. The canal has a diversion capacity of 1,000 cubic feet per second, is 36 miles long, has a maximum top width of 35 feet, a maximum bottom width of 10 feet and a water depth of 9 feet.

FRIANT-KERN CANAL with headworks located in the left abutment of Friant Dam carries water southerly for supplemental and new irrigation in Fresno, Tulare, and Kern Counties. The canal has a maximum top width of 80 feet, a bottom width of 36 feet and 17-foot depth at lined sections. It has a normal capacity of 4,000 cubic feet per second from Friant Dam to Kaweah River at a normal water depth of 15.2 feet and is designed to permit enlargement to 5,000 cubic feet per second in the upper reach. The canal is 153 miles long, and terminates in the Kern River about four miles west of Bakersfield.



PLANNING OF ADDITIONAL PROJECT FEATURES

California's rapid growth requires that more water resource developments be added in the Central Valley Basin. Planning now is underway in various areas to assess potentialities and determine the feasibility of possible additions to the Central Valley Project.

IRRIGATION PLAN

the minimum with extremes at more than seven times the minimum.

RANGE OF TEMPERATURE

The main valley floor has warm dry summers with occasional temperatures exceeding 100°F., and mild winters with minimum rarely below 32°F. The surrounding mountains are generally warm and dry in the summer but the winter temperatures, particularly in the Cascade and Sierra Nevada, frequently drop below freezing.

15-foot diameter penstocks leading to the five main generating units and two station service units. The total nameplate capacity of these units, including two station service units of 2,000 kilowatts each, is 379,000 kilowatts.

KESWICK DAM AND POWERPLANT on the Sacramento River nine miles downstream, provides an afterbay for Shasta and smoothes out the uneven water releases through Shasta Powerplant. The dam also has migratory fish trapping facilities operating in conjunction with Coleman Fish Hatchery on Battle Creek 25 miles downstream. Keswick is a concrete gravity type structure 159 feet in height above the bottom of the foundation and has a crest length of 1,046 feet. The powerplant has three generating units with a total nameplate rating of 75,000 kilowatts.

FOLSOM UNIT consists of Folsom Dam, Reservoir, and Powerplant and Nimbus Dam, Lake Natoma, and Nimbus Powerplant on the American River below a drainage area of about 1,875 square miles. The Folsom Unit was added to the Central Valley Project by Congressional authorization in 1949. Folsom Dam was constructed by the Corps of Engineers and on completion turned over to the Bureau of Reclamation for coordinated operation with other project structures. The dam is composed of a concrete main river section having a maximum height of 340 feet above the bottom of foundation and a crest length of 1,400 feet, flanked by long earth-fill wing dams extending from the ends of the concrete section on both abutments. In addition there is an earthfill auxiliary dam at Mormon Island saddle and eight other earthfill dikes. The reservoir has a capacity of 1,000,000 acre-feet. Folsom Powerplant, constructed and operated by the Bureau of Reclamation, is located just below the dam and has a nameplate capacity of 162,000 kilowatts. The dam regulates flows of the American River for irrigation, power, flood control, municipal and industrial use, fish and wildlife, recreation, and other purposes. Nimbus Dam, located about seven miles below Folsom, is an afterbay to reregulate the power releases through Folsom Powerplant and also can serve as a diversion dam for the proposed Folsom South Canal. A 13,500 kilowatt powerplant is located at the toe of Nimbus Dam. Also at Nimbus Dam is the 30,000,000 egg Nimbus Fish Hatchery which was built to compensate for the spawning area of salmon and steelhead that was cut off at Nimbus Dam. Studies of possible canals to irrigate lands north and south of the American River from the water made available from Folsom Reservoir are in progress.

SLY PARK UNIT was added to the Central Valley Project in 1949 along with the Folsom Unit. It includes Jenkinson Lake formed by Sly Park Dam on Sly Park Creek, a low concrete diversion dam on Camp Creek and the Sly Park-Camino Conduit. Sly Park Dam is an earthfill structure 190 feet high with a crest length of 760 feet, and an auxiliary earthfill dam 125 feet high with a crest length of 650 feet. It has a storage capacity of 41,000 acre-feet. The concrete diversion dam on Camp Creek and a short connecting tunnel from Camp Creek to Sly Park Creek augment the inflow into Jenkinson Lake. Sly Park-Camino Conduit with a capacity of 125 cubic feet per second extends about 7 miles from Sly Park Dam to deliver supplemental water to El Dorado Irrigation District for irrigation and municipal purposes in the vicinity of Placerville.

DELTA CROSS CHANNEL consists of a controlled diversion channel between the Sacramento River and the Mokelumne River at the north end of the Delta and several natural and artificial channels through which Sacramento

POWER TRANSMISSION SYSTEM consists of switchyards, high voltage lines, and substations for delivery of power to project pumps and for wholesale disposal of excess power. The backbone system consists of three 230 kilovolt circuits from Shasta Powerplant to Tracy Pumping Plant, with a 230 kilovolt connection to Folsom powerplant.

IRRIGATION DISTRIBUTION SYSTEMS consist of lateral canals and pipe systems to take water from the main canals and deliver it to individual farms. The Bureau of Reclamation has built several distribution systems and is constructing others for the water users. Some systems or parts of systems already are in existence, and some are being built by local districts.

PROJECT FEATURES UNDER CONSTRUCTION

SACRAMENTO CANALS UNIT was added to the Central Valley Project in 1950. It consists of a system of three main canals to supply irrigation water to lands in the Sacramento Valley, principally in Tehama, Glenn, Butte, and Colusa Counties. The Tehama-Colusa Canal 121 miles long and with an intake capacity of 2,000 cubic feet per second will divert water by gravity from the Red Bluff Diversion Dam on Sacramento River near Red Bluff and serve lands in Tehama, Glenn, Colusa, and northern Yolo Counties. The Corning Canal 26 miles long with an initial capacity of 500 cubic feet per second will divert from the Tehama-Colusa Canal 1/2 mile downstream from the dam with a 55 foot lift pumping plant and will serve lands in Tehama County lying at a higher elevation than can be served from the Tehama-Colusa Canal. The Chico Canal and pumping plant will lift water 30 feet from the Sacramento River near Vina. The canal will have a capacity of 310 cubic feet per second and a length of 26 miles, serving lands principally in Butte County in the vicinity of Chico. The three canals combined will serve over 200,000 acres of land.

THE TRINITY RIVER DIVISION which was authorized by the Congress in 1955 will divert surplus water from the Trinity River Basin into the Sacramento River. The Trinity River joins the Klamath River which flows directly into the Pacific Ocean. Above Lewiston Dam site the river drains about 720 square miles of high-water-producing, mountainous country. Trinity River Division will consist of three dams, two tunnels, and four powerplants to provide an additional irrigation water supply for the Central Valley and additional power generating capacity for Northern and Central California, as well as to improve recreational opportunities and increase minimum flows in the Trinity River.

Trinity Dam on the Trinity River, an earthfill structure 450 feet high will create a reservoir of 2,500,000 acre-feet capacity to regulate flows and store surplus water runoff for irrigation. Trinity Powerplant at Trinity Dam will have an installed capacity of 96,000 kilowatts. Lewiston Dam, about 7 miles below Trinity, will serve as an afterbay and a diversion dam to divert water through tunnels and powerplants to the Central Valley. A possible Lewiston Powerplant, using releases for the support of fish life and for other downstream purposes in the Trinity River, will have an installed capacity of about 1,000 kilowatts. An 11 mile long tunnel will bring water from Lewiston Dam to a 130,000 kilowatt powerplant on Clear Creek. Whiskeytown Dam on Clear Creek will reregulate releases from the powerplant and divert them as well as usable Clear Creek flows into a 3 mile long tunnel, to a 143,000 kilowatt powerplant on the edge of Keswick Reservoir.

The reservoirs of the Central Valley Project are coordinated in their operation in order to obtain maximum yields and to deliver water into the main river channels and into the canals of the project in the most efficient and economical manner. Irrigation and municipal water is delivered from the main canals in accordance with long-term contracts negotiated with irrigation districts and other local organizations. The distribution of water from the main canals to the individual users is the responsibility of the local districts.

IRRIGABLE ACRES IN THE PROJECT

The irrigable acreage of the service area of the authorized Central Valley Project, is approximately 1,300,000 acres. Irrigation service is furnished to new lands and a supplemental supply for presently irrigated areas.

CHARACTER OF SOIL IN IRRIGABLE AREAS

The preponderance of the soils in the project service area are recent alluvial deposits. About one-third of the alluvial soils have moderately compacted subsoils which limit crop adaptability and the types of farming which may be pursued. Shallow residual soils are found on the small area of foothill lands included in the service area.

ALTITUDE OF IRRIGABLE AREA

The irrigable lands lie largely below 500 foot elevation, except for the Sly Park Unit which is in the foothills at an elevation of around 2,500 feet.

FARM WATER REQUIREMENT

The farm water requirement varies somewhat climatologically but principally by crop and soil types. Under good irrigation practices the per acre water requirement will vary from as little as one acre-foot for grain to as much as seven acre-feet for rice. The overall farm water use for the Central Valley Project probably averages around three acre-feet per acre.

LENGTH OF IRRIGATION SEASON

The irrigation season extends over a period of from six to eight months. The total growing season averages over 240 days.

ANNUAL RAINFALL

Precipitation varies throughout the Central Valley geographically, seasonally, and annually. On the main valley floor the rainfall is comparatively light, decreasing from an annual normal of 22 inches at Red Bluff in the north to 6 inches at Bakersfield in the south.

In the Cascade Range and Sierra Nevada on the east side of the valley the precipitation varies from a normal annual high of 80 inches in the north to 35 inches in the south, a large portion of which falls as snow above the 3,100 to 6,400 feet elevation. Precipitation in the Coast Range is less than in the Cascade Range and Sierra and falls almost entirely as rain. Nearly all precipitation occurs in the months October to April. Precipitation varies from year to year, the maximum being generally 3.5 times

The average annual temperature for Sacramento is about 60 degrees, while the average annual temperature for Fresno is about 63 degrees. The average frost-free period in the valley is about 9 months and the remaining winter months are mild with an average of less than 15 days having a minimum temperature below 32 degrees.

PRINCIPAL PRODUCTS

Of the 220 different crops grown on Central Valley farms, the principal ones are field crops--including alfalfa, irrigated pasture, sugar beets, beans, barley, cotton and rice, truck crops--including asparagus, tomatoes, melons and a variety of other vegetables, fruits and nuts, including grapes, peaches, plums, prunes, apricots, pears, figs, olives, oranges, almonds, and walnuts. Field, truck, and pasture seed crops are raised extensively. Practically all of these crops are grown under irrigation, except for some barley, almonds and beans. Over 90 percent of the gross farm income of the Central Valley Basin is from irrigated crops. Although the production of livestock for slaughter and dairy products is very important in the Central Valley, their present production is inadequate to meet local requirements.

PRINCIPAL MARKETS

Because of the favorable climate conducive to the production of many specialty agricultural commodities, crops enjoy a wide distribution, being shipped to all major national and to many international markets. Livestock, livestock products, and basic field crops are primarily marketed locally where increasing markets are developing as a result of substantial population growth.

POWER MARKET

The rapidly increasing demand for power in Northern California assures a ready market for surplus project generation not needed for pumping project water. Power is being sold to about 25 public and Federal agencies by means of wheeling and exchange agreements with the Pacific Gas and Electric Company. Under these agreements the company's transmission facilities are used to serve project customers, and support energy is available at times of low project generation.

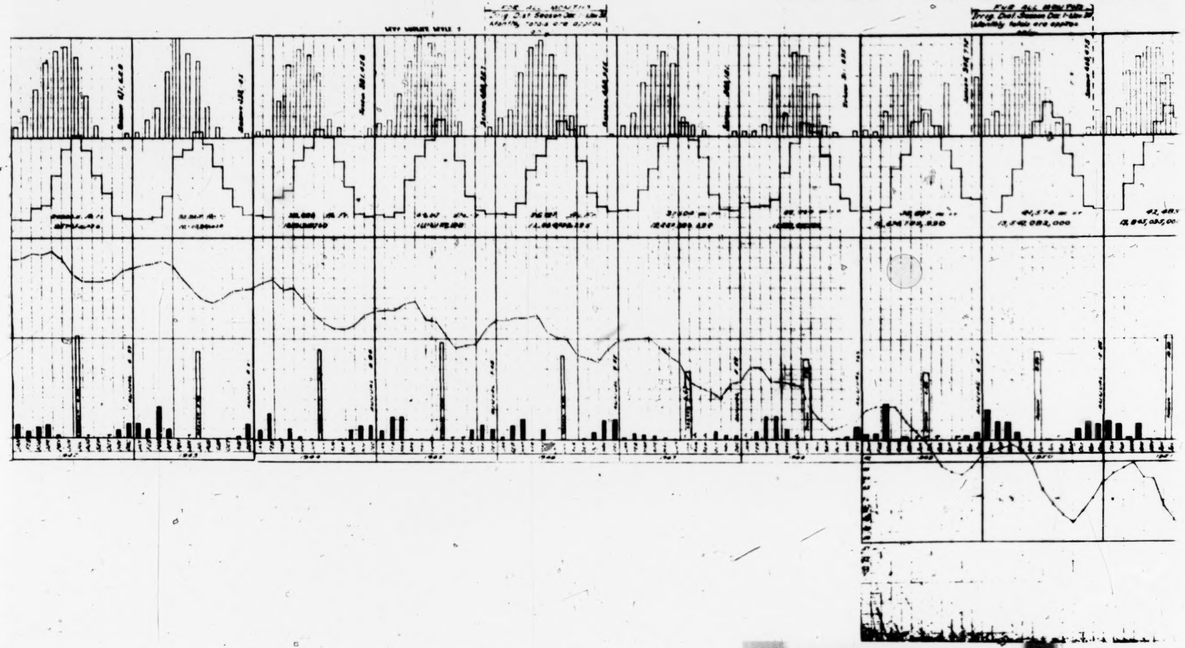
OTHER BUREAU OF RECLAMATION PROJECTS IN THE CENTRAL VALLEY BASIN

ORLAND PROJECT with its related storage and diversion facilities was authorized for construction in 1907 and is not a part of the Central Valley Project. Details will be found on a separate Orland Project map. The project has been operated and maintained by the Orland Unit Water Users Association since October 1954.

SOLANO PROJECT with Monticello Dam and Putah South Canal as its major features is separate from the Central Valley Project. Details of the plan will be found on a map covering that project.

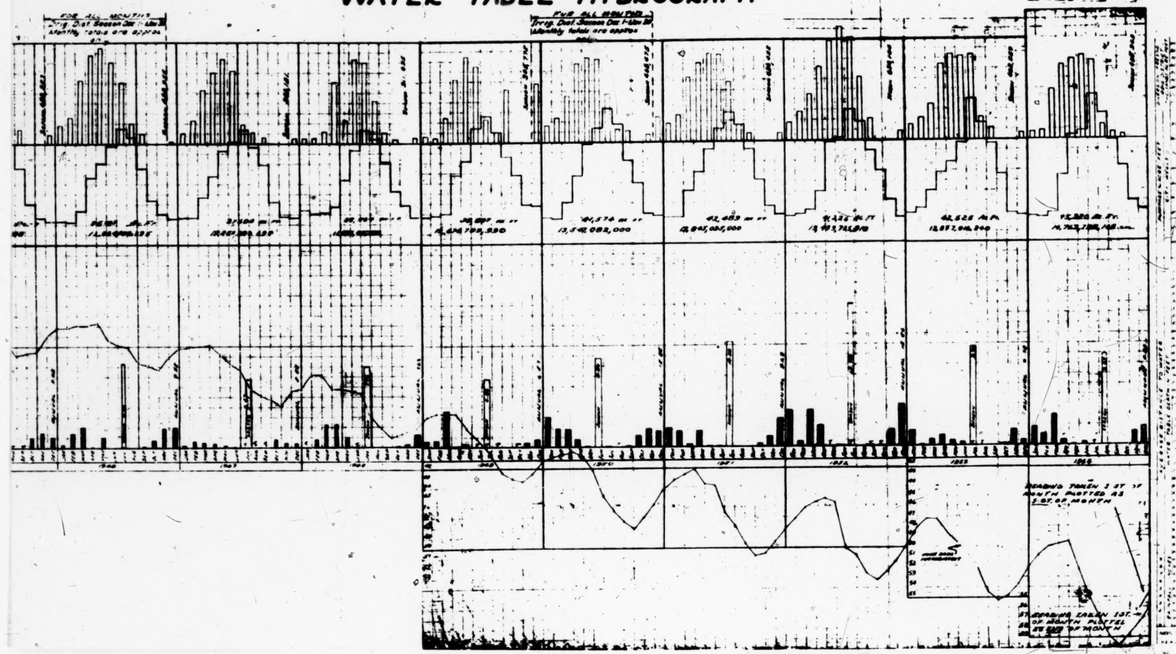
Address all inquiries regarding additional information concerning this Project to
REGIONAL DIRECTOR, REGION 2, BUREAU OF RECLAMATION
P. O. BOX 2511, SACRAMENTO, CALIFORNIA

WATER TABLE HYDROGRAPH



WATER TABLE HYDROGRAPH

EXHIBIT



County as the greatest producer of agricultural products in the United States. In the year 1959 the county produced agricultural crops of a market value of $390,211,118.00. Petitioner, City of Fresno, has a population of 133,929.

The City of Fresno is presently supplied with water by pumping from wells, a large part of which wells were and are supplied by percolating waters from the San Joaquin River. The District Court so found and its decision in this regard was affirmed by the Court of Appeals.

The underground water level in Fresno County and particularly in the City of Fresno had been dropping steadily when the Central Valley Project started and has steadily continued to drop as shown by the chart on the opposite page.

The City of Fresno is presently pumping 60,000 acre-feet a year from the fast diminishing underground while according to Bureau of Reclamation officials, it can only safely pump 30,000 acre-feet a year from this source.[18]

The Bureau of Reclamation's own witnesses admitted that the City of Fresno needs an immediate additional surface supply of 100,000 acre-feet of supplemental surface water in order to survive.[18] The

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[18] "The Witness. Yes, your Honor. Probably from the underground supply that would be around 30,000 acre-feet and the rest would have to come from the surface • • •.

The Court. He didn't say that. He said they could safely have a supply underground of 30,000 and would need another 100,000 acre-feet."

Testimony of U.S.B.R. Engineer Leland K. Hill, R. 1983.

City's engineers estimated the City of Fresno needs at least 150,000 acre-feet of water.

7. **The Record in This Case.**

The printed record in this case has already been filed with the Court in Case No. 366, October Term, 1961 of this Court—the Petition for Writ of Certiorari filed by the appellant Bureau of Reclamation officials. However, this does not constitute the entire official record in this case.[19]

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[19]The complete record in this case is 50,000 pages. The trial before the District Court took nineteen months of continuous trial and the decision of the District Court involves 263 separate rulings—the largest number of points ever decided in a single case according to West's Publishing Company. The parties printed the material portion of the record but not all of the record in order to economize. The trial judge was dissatisfied with the record as printed and on the 31st day of March, 1959, in accordance with Rule 75(i), Federal Rules of Civil Procedure, ordered the entire remaining unprinted record to be made a part of the record and shipped it to the Ninth Circuit Court of Appeals where it now is. The Department of Justice appealed the District Court's order but did not perfect their appeal and therefore the District Judge's order became final. The unprinted portion of the record was generously quoted from by all parties before the Ninth Circuit. It is respectfully suggested that the entire record be shipped to this Court for the use of this Court.

VI

REASONS FOR GRANTING WRIT

1. **THE DECISION OF THE COURT OF APPEALS, THAT THE DETERMINATION OF WHETHER CHARGES FOR WATER TO THE CITY OF FRESNO BY THE APPELLANT BUREAU OF RECLAMATION OFFICIALS WERE REASONABLE OR UNREASONABLE IS AN ADMINISTRATIVE DECISION AND NOT A JUDICIAL DECISION IS ERRONEOUS.**

The District Court found—after months of taking testimony by experts in the field of construction and operation of dams—that any charge to the City of Fresno by the appellant Bureau of Reclamation officials for municipal water in excess of $3.50 per acre-foot was both arbitrary and unreasonable. This part of the decision was based upon voluminous testimony. The appellant Bureau of Reclamation officials, who are also petitioning this Court for a Writ of Certiorari, do not contend that the decision of the District Court in this regard is unsupported by evidence. Neither did the Court below find that this decision of the District Court was not supported by sufficient evidence. The Court of Appeals merely held that the determination of whether the rate for water out of a Bureau of Reclamation project was reasonable or unreasonable was strictly an administrative and not a judicial decision and that the City of Fresno was helpless to do anything about the excessive rate charged. We quote from the opinion of the Court below:

> "Fresno alleges that the monetary demands of these defendants for the supplying of such water

are excessive. The district court so found. It ruled that Fresno was entitled to 'a declaratory judgment that any charge for water which may be made by the United States should be reasonable.' It specified that reasonableness required that such charge should be 'no more than the irrigation districts (supplied by Friant) are charged from time to time for Class I water.' (*Rank v. United States,* supra at page 185).

"In negotiating and contracting for the delivery of water from Friant Dam, defendant officials were acting within the scope of their statutory authority and were carrying out the duties imposed upon them by their official positions. *It is their administrative function to determine the rates at which water shall be delivered.*" (Emphasis ours.)

Appendix, page 25.

The Court below then went on to erroneously state that the appellant Bureau of Reclamation officials were not limited in fixing rates to what the courts may find to be reasonable and in effect that the courts were powerless to grant relief where an administrative official charges unreasonable rates for water from a government project.

"It cannot be said that their statutory authority is limited to the making of such determinations as the courts may find to be reasonable." (Emphasis ours.)

Appendix, page 25.

We submit that the Court below was in error in this regard and that its decision is in direct conflict with the decisions of this Court.

Stark v. Wickard, 321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733—(enjoining Secretary of Agriculture from enforcing unreasonable minimum milk prices set by him).

"The public have a right to be exempt from unreasonable exactions. * * *" (Syllabus.)

Smyth v. Ames, 169 U.S. 466, 42 L. Ed. 819, 18 S. Ct. 418. (Syllabus.)

"The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable. * * * But that involves an inquiry as to what is reasonable and just for the public. * * * The public cannot properly be subjected to unreasonable rates. * * *"

Covington & L. Turnpike Co. v. Sandford, 164 U.S. 578, 41 L. Ed. 560, 566.

"* * * when a case arises in which it becomes necessary to determine whether a properly established rate is a reasonable or constitutional one *either to protect the public against excessive or unreasonable charges* or to protect a public utility against the infringement of its constitutional rights * * * *the courts may determine* the reasonableness of such rate and may *enjoin the enforcement of an unjust, unreasonable* * * * rate." (Emphasis ours.)

43 Am. Jur. 693, 694.

2. THE COURT BELOW IS IN ERROR IN HOLDING THAT THE DETERMINATION OF THE LIMITS OF AUTHORITY GRANTED AN ADMINISTRATIVE OFFICER BY CONGRESS IS AN ADMINISTRATIVE AND NOT A JUDICIAL DECISION.

The District Court enjoined the illegal diversion of Central Valley Project water to lands outside of the county and watershed of origin and which were not to be supplied with water from the Central Valley Project until the needs of the City of Fresno were met.[20] The Court below reversed the District Court on this point holding that the determination of the service area of the Central Valley Project as set forth in the Feasibility Report and acts of Congress was an administrative and not a judicial determination.[21]

It is submitted that the determination of the limits of a mandate of Congress to an administrative agency such as the designation of the service area of the Central Valley Project by Congress is a judicial determination and not a discretionary administrative determination.

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[20] "The City of Fresno is in the County of origin and the Watershed of origin of the San Joaquin River. The legislature in 1951 added Section 11128, specifically making the County and Watershed of Origin Statutes applicable to federally constructed units of the Central Valley Project."

Rank v. Krug, 142 F.Supp. 1, 184.

[21] "The district court ruled that under these statutes the United States, prior to diverting San Joaquin water beyond the watershed or county of origin, *must satisfy the needs of Fresno.*

"* * *. The terms upon which the United States is willing to act in this respect remain an administrative decision which it is within the authority of the defendant officials to make." (Emphasis ours.)

Appendix, page 26.

"Where Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." (Syllabus.)

Stark v. Wickard, Secretary of Agriculture, 321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733 (Syllabus).

"The responsibility of determining limits of statutory authority of administrative agencies is a judicial function." (Syllabus.)

Stark v. Wickard, Secretary of Agriculture, 321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733 (Syllabus).

"This suit alleges that the Secretary of Agriculture is disobeying a congressional mandate. Such allegation gives this court jurisdiction and the suit is not one against the United States. * * * In this case the Secretary has disobeyed the congressional mandate."

Publisher Industries v. Anderson, 68 F. Supp. 532, 533 (1946).

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3. THE COURT BELOW ERRONEOUSLY HELD THAT THE CITY OF FRESNO'S UNDERGROUND PERCOLATING WATER SUPPLY LOCATED IN THE WATERSHED AND COUNTY OF ORIGIN OF THE SAN JOAQUIN RIVER AND USED FOR MUNICIPAL AND DOMESTIC PURPOSES, COULD BE TAKEN BY THE APPELLANT BUREAU OF RECLAMATION OFFICIALS BY EMINENT DOMAIN OR CONDEMNATION AND USED IN OTHER COUNTIES FOR AGRICULTURAL PURPOSES.

As heretofore stated in our Statement, Chapter V, the City of Fresno is located in both the watershed

and county of origin of the waters of the San Joaquin River. It presently pumps its water from the fast diminishing supply of underground percolating water underlying the city which is in large measure supplied by percolation from the San Joaquin River below Friant Dam. This underground supply has been steadily dropping since Friant Dam was completed in 1944 (See Chart opposite page 25 hereof). The city is now pumping over 60,000 acre-feet a year from this fast diminishing source. Bureau of Reclamation engineers at the trial before the District Court testified, the city should not pump over 30,000 acre-feet from this underground source of supply.[22]

The City of Fresno also needs a supplemental surface supply of water of at least 100,000 acre-feet a year from Friant Dam to off-set its fast diminishing underground water supply. This fact was also admitted by the appellant Bureau of Reclamation officials.[23]

This percolating underground water right of the City of Fresno in California is held to be the same or analogous to a riparian right.

> "* * * an overlying landowner * * * has been held to have analogous rights to those of a riparian." (Syllabus.)
>
> *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District,* 3 Cal. 2d 489 (1935), 45 P.2d 972.

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[22]Testimony of Witness Leland K. Hill, U.S.B.R. Engineer, R. 1983.

[23]Testimony of Witness Leland K. Hill, U.S.B.R. Engineer, R. 1982.

The Court below correctly held that the City of Fresno had vested rights to this underground water originating from the San Joaquin River below Friant Dam.

> "Fresno, as an overlying landowner, has vested rights to underground waters from a source fed by the San Joaquin."
>
> Appendix, page 25.

The Court below also correctly held that the United States had not taken these rights by eminent domain or condemnation.

> "We conclude that the water rights of these plaintiffs have not been acquired by the United States through exercise of its power of eminent domain."
>
> Appendix, page 41.

However, the Court of Appeals went further and erroneously held that the appellant Bureau of Reclamation officials had the right to acquire the underground percolating waters of the petitioner, the City of Fresno, used to supply domestic and municipal water by eminent domain or condemnation and to give it to farmers outside the county and watershed of origin for agricultural uses. We quote from the opinion of the Court below in this regard which we feel is in error.

> "We conclude that the United States has the power to acquire the rights of these plaintiffs through exercise of eminent domain."
>
> Appendix, page 31.

Assuming for the purpose of argument that the Government of the United States can acquire *anything* needed by it for general welfare purposes through its power of eminent domain, nevertheless, Congress here never authorized these appellant Bureau of Reclamation officials to take the underground percolating waters of the City of Fresno, needed for human consumption and domestic use, which use either under the laws and statutes of the State of California or under the decisions of this Court, have priority over agricultural uses, and to take them out of the county of origin and watershed of origin of the San Joaquin River in violation of the Basic Reclamation Act of June 17, 1902 (32 Stat. 388; 43 U.S.C. 391 et seq.) and turn them over to farmers outside the watershed and county of origin for strictly agricultural purposes on undeveloped lands on which Congress had prohibited the use of Central Valley Project water.[24]

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[24] "Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, * * *."

Act of June 17, 1902 (32 Stat. 388, 390) (43 U.S.C. 391 et seq.).

Such is the ruling of this Court.

"We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes."

State of Nebraska v. State of Wyoming, 325 U.S. 589, 612, 65 S.Ct. Rep. 1332, 1348.

"The Basic Reclamation Act under which the Central Valley Project was constructed provides that the Bureau of Reclamation must recognize and protect all existing water rights in any state in which it operates."

State of Oregon v. Fed. Power Commission, 211 F. 2d 347 (9th Cir. 1954).

The laws of the State of California in which the Central Valley Project is located, specifically provide that water for domestic use is the highest use of water in California.

> *"Highest uses of water; domestic; irrigation.* It is hereby declared to be the established policy of this State that the use of *water for domestic purposes is the highest use of water* and that the next highest use is for irrigation (Stats. 1943, c. 368, p. 1606.)." (Emphasis ours.)
>
> *California Water Code, Sec. 106.*

> *"State Use and Control of Water.* It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and *that the State shall determine* what water of the State, surface and underground, can be converted to public use or controlled for public protection. (Stats. 1943, c. 368, p. 1606.)" (Emphasis ours.)
>
> *California Water Code, Sec. 104;*
> *California Constitution, Art. XIV, 3.*

The laws of the State of California also provide that no water shall be taken out of a watershed or county of origin until the needs of the watershed and county of origin are fully supplied.

> *"Prior right to watershed water.* In the construction and operation by the authority of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to all of the water rea-

sonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein. (added Stats. 1943, c. 370, p. 1896.)"

California Water Code, Sec. 11460.

"*Limitations. The limitations prescribed in Sections 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof,* including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part. (added Stats. 1951, c. 1325, p. 3216, Sec. 1.)" (Emphasis ours.)

California Water Code, Sec. 11128.

This Court has held that it is for the state to say what rights of a riparian owner may subsist along with a federal right.

". . . any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water * * * *this clearly leaves it to the State to say what rights of an appropriator or riparian owner may subsist along with any federal right.*" (Emphasis ours.)

United States v. Gerlach Live Stock Co., 339 U.S. 725, 734; 70 S. Ct. 955, 960 (footnote), (1950); 94 L. Ed. 1231.

Moreover the Bureau of Reclamation consistently represented to Congress that it would recognize county

of origin and watershed of origin statutes in their operation of the Central Valley Project.

> "66. IN ADDITION TO RESPECTING ALL EXISTING WATER RIGHTS, THE BUREAU IN THIS REPORT HAS COMPLIED WITH CALIFORNIA'S COUNTY-OF-ORIGIN LEGISLATION, WHICH REQUIRES THAT WATER SHALL BE RESERVED *for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus waters will be exported elsewhere.* * * *" (Emphasis ours.)
>
> Senate Document 113, 81st Congress, Page 65, Plaintiffs' Exhibit 136, R. 2285.

Finally, and what is most important, Congress itself specifically required the appellant Bureau of Reclamation officials to conform to county of origin and watershed of origin acts in reauthorizing the Central Valley Project.

> "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that the Central Valley project, California, authorized by section 2 of the Act of Congress of August 26, 1937, (50 Stat. 850), *is hereby reauthorized* * * *.
>
> "Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS,

INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (Emphasis ours.)

Reauthorization Act of October 13, 1949 (63 Stat. 852, 853).

It is therefore submitted that the Court below was in error in holding that the appellant Bureau of Reclamation officials could take the underground percolating waters used by petitioner, the City of Fresno required for municipal and domestic uses in the county and watershed of origin of said waters, by condemnation or eminent domain, and transport and use them out of the county and watershed of origin for lower priority agricultural uses on non-cultivated lands on which Congress had expressly prohibited the use of Central Valley Project water.[25]

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[25]Although nowhere in the record does it appear and although it is therefore immaterial to this appeal, it might be pointed out to this Court that while this case was on appeal to the Court below the present appellant Bureau of Reclamation officials granted the petitioner a contract for 60,000 acre-feet of water at $10.00 per acre foot. *This contract, however, expressly provided that the price may be reduced and the amount increased in accordance with the final determination of this case on appeal.*

4. **SINCE NO ERROR OF THE DISTRICT COURT IN REGARD TO THAT PART OF ITS DECISION THAT ANY CHARGE IN EXCESS OF $3.50 PER ACRE-FOOT BY APPELLANT BUREAU OF RECLAMATION OFFICIALS TO THE CITY OF FRESNO FOR WATER WAS UNREASONABLE WAS CITED IN APPELLANTS' DESIGNATION OE RECORD ON APPEAL, NOR IN THEIR APPEAL BRIEFS, NOR DID THE COURT BELOW FIND THAT THIS PART OF THE DECISION OF THE COURT BELOW WAS UNSUSTAINED BY EVIDENCE, IT WAS ERROR FOR THE COURT OF APPEALS TO REVERSE THE DISTRICT COURT ON THIS PORTION OF ITS DECISION.**

No error of the trial Court was cited in appellants' statement of points on appeal as to the District Court's finding that any charge in excess of $3.50 per acre-foot to the City of Fresno was unreasonable as required by Rule 75 (d), Federal Rules of Civil Procedure (28 U.S.C. 75 (d)). Objection to the price of water cannot therefore be raised on this appeal. Numerous authorities supporting this point have been cited in our appeal brief so we will not further discuss the matter. (*Jesionowski v. Boston & M.R.R.* (1947), 329 U.S. 452, 67 S. Ct. 401, 91 L. Ed. 416; Sec. 6158, Cyclopedia Federal Procedure, 3rd Ed.; *Cakmar v. Hoy,* 265 F. 2d 59 at 62 (9th Cir. 1959); *State of Washington v. U.S.,* 214 F. 2d 33 at 44 (9th Cir. 1954); *Bennett v. Scofield,* 170 F. 2d 887 (5th Cir. 1948).)

Neither did the appellant Bureau of Reclamation officials contend, nor did the Court below find, that this finding of the District Court was unsustained by the evidence.

5. THE DECISION OF THE COURT BELOW IN DISMISSING THE UNITED STATES AS A PARTY TO THE PRESENT ACTION IS ERRONEOUS.

The District Court joined the United States as a party to this action under the Act of July 10, 1952 (66 Stat. 518, 560, Section 208, Subsection (a)) reading as follows:

> "Sec. 208. (a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit."
>
> Act of July 10, 1952 (66 Stat. 518, 560, Sec. 208, Subsection (a)).

The Court below reversed the District Court and ordered the United States dismissed as a party defendant.

It is submitted that the decision of the Court below is erroneous in the following particulars:

(a) The Court Below Erroneously Held That the United States Could Not Be Brought Into a Class Action Suit Under the Act of July 10, 1952.

Under the later decisions of this Court, waiver of immunity of the United States to suit should be liberally construed.

> "The Government has premised its position largely on the principle that statutes in derogation of sovereign immunity must be strictly construed. *Where a statute contains a clear and sweeping waiver of immunity from suit on all claims* with certain well defined exceptions, resort to that rule cannot be had in order to enlarge the exceptions." (Emphasis ours.)
>
> *United States v. Yellow Cab Co.*, 340 U.S. 543, 554, 71 S. Ct. 399, 406, 95 L. Ed. 523.

> "'*Sovereign immunity*' * * * undoubtedly runs counter to democratic notions of the moral *responsibility of the State*. Accordingly, courts reflect a strong legislative momentum in this tendency to extend the legal responsibility of the government and to confirm Mailland's belief expressed nearly fifty years ago, that 'it is a wholesome sight to see "the crown" sued and answering to its Torts'." (Emphasis ours.)
>
> Justice Frankfurter, *Larson v. Domestic and Foreign Commerce Corp.*, Footnote, 337 U.S. 682, 723, 69 S. Ct. 1457 (1948), 93 L. Ed. 1028.

The Act of July 10, 1952 (66 Stat. 518, 560, Section 208 (a)) refers to *"any suit"*. A statute should be construed according to the "plain, obvious meaning of the statute". (*Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 45 S. Ct. 274, 69 L. Ed. 660.) "Any suit" means "all suits". *Richardson v. Ainsa*, 218 U.S. 289, 31 S. Ct. 23, 54 L. Ed. 1044; 3 C. J. 232; 3 C. J. 235, Note 72 (a); *U. S. v. Swift & Co.*, 158 F. Supp. 551, 554, 555.

The Court below assumed the presence of some infinitesimal appropriative and prescriptive rights would prohibit a class action but it is submitted that under the "plain, obvious meaning of the statute" a class action is clearly within the meaning of "any suit" as used in the Act of July 10, 1952 (66 Stat. 518, 560, Section 208, Subsection (a)) and that the United States was properly joined as a party defendant.

(b) The Lower Court Was in Error When It Held That All Necessary Parties Were Not in Fact Joined in the Present Action.

All the appellant irrigation districts having contracts to water from Friant Dam are parties to this action. The entire Central Valley Project was constructed on the theory that it would not affect any water rights below the junction of the San Joaquin River and the Merced River.[26] The United States had acquired all water rights between this junction of the Merced River and Friant Dam[27] with the exception of 57 water rights represented by the named plaintiffs in the class action complaint filed by them. The United States was a party to this action. The District Court

[26]State of California Report No. 3, "Definition of Rights to the Waters of the San Joaquin River Proposed For Diversion to Upper San Joaquin Valley", August, 1936.

[27]Defendants' Exhibit A-48-A and Defendants' Exhibit A-9-A-1.

passed on the title and water rights of each separate parcel of land between Friant Dam and Gravelly Ford Canal (R. 990-996 and R. 999), a point located 38 miles downstream from Friant Dam which was the lowest point on the San Joaquin River to be supplied with water out of Friant Dam.[28]

(c) The Decision of This Court in the Present Case Is Not Consistent With the Decision of This Same Court in the Case of People of the State of California v. United States, 235 F.2d 647 (9th Cir.) Nor With Miller v. Jennings, 243 F.2d 157 (5th Cir.) Which Latter Case Is Based Upon People of the State of California v. United States, Supra.

In holding that the United States should be dismissed as a party in this action this Court relied on the case of *People of the State of California v. United States,* supra. *Miller v. Jennings,* supra, is based on this case. The last paragraph of this Court's decision in *People of the State of California v. United States,* supra, is respectfully pointed out to this Court:

> "The cause is therefore reversed and remanded with directions *to take further proceedings in accordance with this opinion and enter no judgment until the entire suit can be disposed of at the same date.*" (Emphasis ours.)
>
> *People of the State of California v. United States,* 235 F. 2d 647 at 664 (9th Cir. 1956).

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[28] "9. (a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant which would be for one or more of three purposes: (1) *to satisfy riparian rights between Friant and Gravelly Ford;* • • •." (Emphasis ours.)

Wolfsen v. United States, 162 F.Supp. 403 at 410 (1958).

If there are any persons who have not been joined in this suit it is submitted that in fairness, the petitioner should have the same opportunity accorded them to join any other parties, not joined, as was done in *People of the State of California v. United States,* supra.

As has been pointed out by this Court on numerous occasions, a necessary party may be joined even though the case is on appeal in this Court and it is submitted that the refusal of the Court below to allow the joinder of other necessary parties, *if any there were,* is in direct conflict with the following decision of this Court:

> "To dismiss the present petition and require the * * * plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration. * * *"
>
> *Mullaney v. Anderson,* 342 U.S. 415, 417, 72 S. Ct. 428, 430 (1952), 96 L. Ed. 458.

(d) The Importance of Municipal Water Supply and the Interpretation of the Act of July 10, 1952 (66 Stat. 518, 560, Sec. 208 (a)) Is of Such Great Importance as to Deserve an Interpretation of This Act by This Court.

The water supply of this country is continually dwindling, especially the water supply of cities. The United States through its reclamation and flood control projects has rights on most of the great rivers and water supplies of this country. Proper determination of the rights and streams may not be obtained unless the provisions of the Act of July 10, 1952 (66 Stat. 518, 560, Sec. 208 (a)) are availed of.

We feel it is of great importance to this country as a whole that this Court should interpret the rights given the states, municipalities and irrigation districts of this country to join the United States as a party under this action for a full determination of their water rights in various irrigation and flood control projects now under construction in the United States.

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6. APPELLANTS SHOULD NOT BE ALLOWED FOR THE FIRST TIME ON A MOTION FOR REHEARING TO RAISE POINTS NOT DESIGNATED IN THEIR POINTS ON APPEAL NOR IN THEIR BRIEF ON APPEAL IN ACCORDANCE WITH RULE 75 (d), FEDERAL RULES OF CIVIL PROCEDURE (28 U.S.C. 75 (d)).

We will only touch upon this matter briefly.

These appellant irrigation districts, for the first time on their motion for re-hearing, and after having asked the Court to grant a physical solution, and after the Court had spent many months in the trial of the case in decreeing a physical solution, asked that they be dismissed from this action without costs. In event the lower Court should amend its decision in this regard we point out that in accordance with the decisions of this Court appellants may not raise new questions for the first time on a motion for re-hearing where such questions were not designated in their designation of record on appeal. (*Jesionowski v. Boston & M. R. R.* (1947), 329 U.S. 452, 67 S. Ct. 401, 91 L. Ed. 416, *Bennett v. Scofield,* 170 F.2d 887 (5th Cir. 1948).)

VII

CONCLUSION

Due to several important errors in the decision of the Court below, due to the importance of this case to one of the leading cities of the West, and due to the importance of the points involved in this petition to the fast dwindling water supplies of the nation's cities as a whole, we pray that this Petition for a Writ of Certiorari, directed to the Ninth Circuit Court of Appeals be granted.

Dated, Fresno, California,
December 2, 1961.

Respectfully submitted,
JOHN H. LAUTEN,
CLAUDE L. ROWE,
Attorneys for Petitioner.

(Appendix Follows.)

Appendix

United States Court of Appeals for the Ninth Circuit

No. 15,840

State of California, United States of America, et al.,
Appellants,

vs.

Everett G. Rank, et al.,
Appellees.

March 31, 1961

Upon Appeals from the United States District Court for the Southern District of California, Northern Division.

Before Hamlin and Merrill, Circuit Judges, and Powell, District Judge

Merrill, Circuit Judge:

This case involves the Central Valley project, an important undertaking of the Bureau of Reclamation in California's Central Valley.

Suit was brought by these appellees in 1947 to enjoin Bureau officials from the impounding of water at Friant Dam on the San Joaquin River in contravention of the rights of appellees to the beneficial use of the waters of the San Joaquin below Friant. Since commencement of this suit by individual water users, the City of Fresno has intervened as a plaintiff also

asserting rights to San Joaquin waters.[1] We shall hereafter refer to appellees as plaintiffs.

By court order, in 1953, the United States, over its protest, was joined as a necessary party defendant and appears on this appeal as an appellant. In 1951, the State of California intervened and upon this appeal supports the position of the appellants. Also appearing as appellants are the irrigation districts which benefit from the operation of the Friant Dam by the Bureau. We shall hereafter refer to appellants as defendants.

This suit has finally reached this court upon the merits. The district court has granted the plaintiffs an injunction, their right to which is challenged by the defendants.[2] The issues upon appeal divide themselves into jurisdictional questions and those relating to the merits of the dispute.

The jurisdictional issues are presented by the contentions of the defendants that the United States is

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[1]Also intervening as plaintiff was the Tranquility Irrigation District. This court is now advised that the dispute between this irrigation district and the Bureau of Reclamation has been resolved by agreement and no longer constitutes an issue upon appeal.

[2]The opinion of the district court is to be found under the title of Rank v. (Krug) United States, 1950, 142 F. Supp. 1. Connected cases dealing with intermediate orders of the district court are: Rank v. Krug, 1950, 90 F. Supp. 773; United States v. United States District Court, 9 Cir., 1953, 206 F. 2d 303; California v. United States District Court, 9 Cir., 1954, 213 F. 2d 818; Rank v. United States, 1954, 16 F.R.D. 310; City of Fresno v. Edmonston, 1955, 131 F. Supp. 421. Also involving the Central Valley Project but not these litigants or their disputes are United States v. Gerlach Livestock Company, 1950, 339 U.S. 725, affirming the decision of the Court of Claims, 1948, 111 Court of Claims 1, 76 F. Supp. 87; Ivanhoe Irrigation District v. McCracken, 1958, 357 U.S. 275.

an indispensable party; that it has not consented to suit and has been improperly joined; that in its absence the district court was without jurisdiction to entertain the dispute with reference to the operation of the Friant Dam by the Bureau.

Upon the merits, the issue is whether it is permissible for these plaintiffs to interfere by injunction with the public use which the Central Valley project represents. More specific issues are presented by the contention of defendants that the water rights of the plaintiffs, to the extent to which they claim injury, have been taken by the United States through exercise of its power of eminent domain and that the remedy of the plaintiffs is to seek compensation in the Court of Claims.

I. The Facts, the Pleadings and the Decree.

California's Central Valley is an immense elongated bowl approximately four hundred miles in length and at its widest point approximately one hundred miles in width. It is bounded on the north by the Siskiyou Mountains, on the south by the Tehachapi Range, on the east by the Sierra Nevada and on the west by the Coast Range. It includes more than one-third of the State of California.

The northern half of this valley is known as the Sacramento Valley and is the valley of the Sacramento River. This river rises at Mount Shasta and flows south parallel to the Sierra, joining on its course the many great rivers rising in the northern portion of the Sierra.

The southern half of the Central Valley is known as the San Joaquin Valley and is the valley of the San Joaquin River. This river rises in the High Sierra south of Yosemite Valley. Its course at first is to the west. It emerges from the mountains at a point known as Friant, flows out on the floor of the valley and at a point known as Mendota changes to a northerly course. For the purpose of this opinion, we shall divide the San Joaquin into three segments: that to the east of Friant we shall call the "upper"; that between Friant and Mendota the "central"; that below Mendota the "lower".

These two great rivers, the Sacramento and the San Joaquin, flow toward each other to join near Stockton. In past centuries their combined flow escaped the valley through a cut in the Coast Range at Carquinez to empty into San Francisco Bay. Today the bay has invaded the valley and a substantial arm, Suisun Bay, lies to the east of Carquinez. It is into Suisun Bay, well within the Central Valley, that the Sacramento and San Joaquin now empty.

The Sacramento River, through its tremendous tributaries from the Sierra, develops a surplus of water. The San Joaquin, on the other hand, fails to produce sufficient water to enable the rich lands of its valley to realize their fertile potentialities. The Central Valley project attacks this problem. Originally projected by the State of California as part of the State Water Plan, it has, through congressional sanction and for lack of state funds, been undertaken by the Bureau of Reclamation. Its feasibility was reported to the

President by the Secretary of the Interior on November 26, 1935, pursuant to § 4 of the Act of June 25, 1910, 36 Stat. 835.

The project contemplates the impounding of the waters of the upper San Joaquin at Friant. To this end the United States has acquired, by assignment from the original applicants, applications to appropriate under state law over four million acre feet of water annually. The processing of these applications has been halted pending the outcome of this case.

For the lands of the lower San Joaquin, the project contemplates an exchange of waters from the Sacramento River. This is to be accomplished by pumping Sacramento River water, at a point on its delta near Tracy, into a canal—the Delta-Mendota Canal—which would carry it south to Mendota, where it would be pumped into the bed of the San Joaquin through the Mendota pool. The waters impounded at Friant would be diverted north and south through canals to irrigation districts desperately in need of supplemental water.

Thus the upper San Joaquin is to continue in its natural flow until impounded at Friant. The lower San Joaquin is to be supplied with Sacramento water. The case before us involves the central San Joaquin, the sixty-mile stretch between Friant and Mendota. Plaintiffs claim rights to San Joaquin water upon this segment of the river as owners of lands either riparian to the river or overlying subterranean reservoirs fed by the river. The United States has successfully negotiated contracts with many of the water

users on this stretch of the river. Plaintiffs are among those who have refused to enter into such contracts.

The water law of California, to which the Federal Reclamation Act of 1902 defers, § 8, 32 Stat. 390, 43 U.S.C. § 383[3] has been extensively dealt with in the opinion of the district court. Rank v. (Krug) United States, 142 F. Supp. 1, 104-115, 161-165. We note that as distinguished from most western states California does with modifications recognize the common law doctrine of riparian rights. Lux v. Haggin, 69 Cal. 255, 10 P. 674. The riparian and (as to subterranean waters) the overlying land-owners have the paramount right to the use of the waters of a stream system. An appropriator of water may reach only that surplus which is not required by the riparian and overlying owners.

By constitutional amendment in 1928, the rights of riparian and overlying owners were limited to reasonable use and reasonable methods of diversion with no right to make wasteful use of water.[4] In its dis-

[3] "That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws • • •."

[4] Article 14, § 3, of the California Constitution provides:

"The right to water in or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consist-

cussion of California water rights, the district court in its opinion, states at page 162:

> "The California courts, confronted with the command of the 1928 constitutional amendment that water should not be wasted, and also with the guaranties of that amendment that existing water rights be preserved to the extent of their present and prospective reasonable and beneficial uses, evolved a type of decree which for the sake of convenience is called a 'physical solution.'
>
> "In essence, such decree is but the conditional injunctive decree of a court of equity. Such decrees in California water rights cases are characteristic examples of the preservation by equity courts of the elements of flexibility and expansiveness so that new remedies may be invented or old ones modified in order to meet the requirements of every case and to satisfy the needs of every progressive social condition."

Further at pages 163-164, the opinion states:

> "The matter of a physical solution becomes a practical problem which will vary with each case. That practical problem is best stated by the question—how can the utmost beneficial use be made of the waters of the particular stream without invading prior vested water rights? If those prior vested water rights can be preserved and satisfied by giving them the water to which they are entitled, and at the same time waste can be prevented by reasonable changes in natural physical characteristics, then, under the California de-

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ently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses * * *."

> cisions, the court may solve that problem by the use of its injunctive powers, conditioned upon making those physical changes. The parties seeking to make an appropriation or to take water, in derogation of prior vested rights, can be enjoined from taking water until those physical changes are made. The efforts of the courts of California in imposing conditional decrees of injunction requiring a physical solution have been to, as near as possible, satisfy the prior vested rights whether riparian or overlying, and at the same time make available, for appropriation and reasonable and beneficial use elsewhere, all water in excess of that required to satisfy those prior vested rights."

This suit was commenced September 25, 1947. Originally brought in the state courts, it was, on motion of the defendants, removed to the district court under 28 U.S.C. § 1441 (a). That removal was held proper. Rank v. Krug, 1950, supra, footnote 2.

The complaint of plaintiffs, in general effect, alleges that defendant officials of the Bureau of Reclamation through the construction and operation of Friant Dam, threaten to and are impounding and diverting water of the San Joaquin in disregard of plaintiff's rights to the use of such water. The complaint, as supplemented and amended, alleges that ever since the commencement of the project in 1935 defendant officials and their predecessors had repeatedly informed and assured plaintiffs that their water rights would not be taken or disturbed; that on July 15, 1947, they were advised by an official of the Bureau that, unless they either accepted an offer by the Bureau

for the "adjustment" of their water rights on terms fixed by the Bureau or filed suit for damages before October 20, 1947, their water rights would be taken without compensation.

The complaint prayed for an injunction against interference with their rights, or, in the alternative, that the court decree a physical solution to provide them with water to meet their rights.

This suit at the outset was recognized by all parties as one to secure a judicial determination of the extent of the vested water rights of the plaintiffs and of the conditions under which defendants, without adversely affecting those rights, might appropriate waters of the San Joaquin. Although the rights of the plaintiffs to the full natural flow of the river were disputed, it was conceded that they were entitled to a reasonable quantity of water and to put such water to use by reasonable methods of diversion.[5]

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[5]Defendant officials, in their answer, stated that the plan of the Central Valley Project—

"• • • requires the Bureau of Reclamation to, and it will, recognize and respect existing water rights of all riparian owners, including such of the plaintiffs, if any, as are riparian owners, on the San Joaquin river between Friant Dam and Gravelly Ford, as they exist under the laws of the State of California and which have not heretofore been acquired or adjusted by the United States."

Further it is alleged:

"• • • that the authorized and declared plan of operation of the Central Valley Project will not deprive plaintiffs or any or either of them, or any other person, firm or entity, of their water rights as they exist under the laws of the State of California • • •."

The defendant officials in part prayed:

"4. That this Honorable Court determine that the lands found to be riparian to the said San Joaquin River shall be entitled to a reasonable quantity of water for beneficial use thereon for irrigation and domestic purposes, and that sufficient water be allowed

The nature of the dispute changed subsequently when, in answering the complaint in intervention of the City of Fresno, the defendants alleged:

> "The United States of America through the exercise of its power of eminent domain has taken all rights to the use of water in the San Joaquin River which are required for the operation of Friant Dam and its appurtenant works, all com-

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to flow in the San Joaquin River to furnish said riparian owners with said supply of water by the use of reasonable means of diversion from the said San Joaquin River by pumps, and further determine that channelization of the said San Joaquin River be made so as to reduce the quantity of water to be discharged from Friant Dam in order to supply said riparian lands with said quantity of water.

"5. That this Honorable Court determine and adjudge that a live stream shall be maintained at all times between Friant Dam and Gravelly Ford on said San Joaquin River, which said live stream shall at no time be required to be in excess of the natural flow of the San Joaquin River if Friant Dam were not constructed and in operation, which said live stream shall be for the purpose of supplying the said quantity of water for use upon lands riparian to said San Joaquin River and to supply the underground percolating waters for lands determined to be entitled to a recharge from the San Joaquin River for said underground waters.

"6. That this Honorable Court further determine that at no time a flow of greater than five second-feet need pass the downstream boundary of the lowest riparian owner upon said river between Friant Dam and Gravelly Ford."

The defendant irrigation districts and the State of California, as intervener, alleged in response to the complaint:

"That pursuant to Article XIV, Section 3 of the Constitution of the State, the plaintiffs cannot demand and the defendants cannot permit any wasteful or prodigal use of the water of the San Joaquin River. That the plaintiffs have no right to the whole flow of the San Joaquin River as alleged in paragraph IV of the complaint, nor do the plaintiffs have the right to any part of the flow of the river in excess of the amounts required to meet their reasonable needs for irrigation and domestic uses. That the plaintiffs have no right to insist on the uninterrupted use of their existing diversion devices and must submit to a physical solution whereby their reasonable needs and uses may be supplied; that this court has the power and duty of requiring a physical solution."

ponents of the Central Valley Project; that fee simple title to all the rights to the use of water required for the operation of the Central Valley Project has at all times since that taking resided in the United States of America."

From the outset the defendants have contended that the United States is an indispensable party without which the district court cannot entertain this suit upon the merits. On September 18, 1953, an order was made joining the United States as a party defendant. Save for moving to dismiss the action against it, the United States thereafter ignored this suit in the district court and a default judgment has been entered against it.

Following trial, the district court ruled that the vested rights of the plaintiffs in no respect had been acquired by the United States through exercise of its power of eminent domain. Upon trial, three plans of physical solution had been offered: one by the plaintiffs, one by the defendants and one by the State of California as intervenor. The district court rejected the last two plans as inadequate. It approved in principle the plan submitted by the plaintiffs and adopted it in part, reserving jurisdiction to modify its decree as experience might direct.

The decree entered June 20, 1957, enjoined the defendants from "impounding, or diverting or storing for diversion, or otherwise impeding or obstructing the full natural flow of the San Joaquin River." It was provided that this injunction should not go into effect should the United States or the defendant irrigation

districts place in operation, maintain and operate the prescribed physical solution.

The solution as decreed consisted of a series of ten ponds in the natural channel of the river created by ten collapsible check dams to be so operated as to provide releases of water sufficient to flush and scour the aquifers by which river water found its way to the underground reservoirs from which the claimants of overlying rights received their water. By this means it was felt that a flow of less than the full natural flow could simulate the full natural flow effectively. It was provided that a sufficient flow of water be released from Friant Dam to provide a minimum flow of five second feet over the last check dam downstream. Thus it was assured that the quantity of water released would, with a surplus of five second feet, be sufficient to meet the demands of all water users.

II. The Jurisdictional Issues.

We proceed to the jurisdictional questions presented by this appeal. The first question is presented by the contention of the United States that it has not consented to suit and has improperly been joined as a party defendant.

If consent to suit is to be found, it must be through the provisions of the waiver of immunity statute passed by Congress in 1952, which has come to be known as the "McCarran Amendment." 66 Stat. 560, 43 U.S.C. § 666. This statute provides in part:

> "Consent is given to join the United States as a defendant in any suit (1) for the adjudication

> of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit."

The question presented by the contention of the United States requires us to determine whether this suit can be regarded as one "for the adjudication of rights to the use of water of a river system" within the meaning of § 666.

There can be little doubt as to the type of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters of a stream system; rather, it was the quasi-public proceeding which in the law of western waters is known as a "general adjudication" of a stream system: one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated.

With reference to this type of suit, the Senate Report upon the bill which became § 666 quoted as follows from *Pacific Live Stock Co. v. Oregon Water Board*, 1916, 241 U.S. 440, 447:

> All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the

> lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators. S. Rep. No. 755, 82d Congress, 1st Session 5 (1951).

The Senate report also incorporated correspondence between Senators Magnuson and McCarran. The former was disturbed by the thought that private water disputes could, under the bill, interfere with reclamation projects in which he was interested. Senator McCarran wrote (S. Rep. No. 755, 82d Congress, 1st Session 9 (1951)):

> "You indicate that you visualize the possibility of an individual or group, having water rights on that stream bringing suit to adjudicate their respective rights thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending.
>
> "S. 18 is not intended to be used * * * for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream."

In *Miller v. Jennings*, 5 Cir., 1957, 243 F.2d 157, 159, discussing the nature of the suit to which § 666 referred, the court stated:

> "The United States has not given its consent to be joined as a defendant in every suit involving water rights. It may be made a party only in suits 'for the adjudication of rights to the use of water of a river system or other sources'. There can be an adjudication of rights with respect to the upper Rio Grande only in a proceeding where all persons who have rights are before the tribunal."

That opinion then quoted this court:

> "The Ninth Circuit Court of Appeals has most succinctly stated the doctrine in this manner: 'The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of lands on the watershed and all appropriators who use water from the streams involved in another watershed in court at the same time.' *People of the State of California v. United States*, 9 Cir., 1956, 235 F.2d 647, 663."

The question remains whether the suit at bar was for such a general adjudication of a river system as was contemplated by Congress.

In two respects we feel that it has failed to measure up. First, all claimants have not been joined. Second, neither the relief prayed for nor the decree includes the establishment of the rights of the claimants as between themselves. The controversy thus is limited to a private one between the claimants on the one hand and the officers of the Bureau of Reclamation on the other.

The plaintiffs attempted to meet the problem of joinder by treating the suit as a class action under

Rule 23, F.R.C.P. In their amended complaint they asserted that they represented not only themselves but all others similarly situated. The district court ruled that the suit was a proper one for application of Rule 23, since "the character of the right sought to be enforced is a common right to water from a common source of supply * * *." *Rank v. United States,* supra, at page 155.

It may well be that those claiming riparian and overlying rights could properly be treated as a class, since the scope of their rights and the limitations imposed upon them by the physical solution decreed are dependent upon circumstances common to all. This suit, however, involves appropriative and prescriptive rights as well as riparian and overlying rights. In its decree the district court took note of the fact that certain of the plaintiffs individually claimed appropriative or prescriptive rights. In six instances the decree adjudicated the rights of these plaintiffs not as between themselves but as against the defendants. The decree expressly purports to adjudicate the rights of all who claim through appropriation or prescription as a class represented by the parties plaintiff.

These plaintiffs, as claimants of appropriative or prescriptive rights, cannot, however, speak for others "similarly situated." The extent of the rights of others must depend upon the circumstances of each individual case. As pointed out in *Miller v. Jennings,* supra, appropriative rights cannot be established by a class action. The claimants individually must be before the court.

With respect to the private nature of the controversy, the district court recognized that this was not a suit in which the water users sought to enforce their rights as among themselves or to have given amounts of water declared and adjudicated as their rights. *Rank v. United States,* supra, at pages 36, 105, 155. Nevertheless, since the suit required a judicial determination of rights to the use of waters of the San Joaquin, since such asserted rights were of the very essence of the suit and since their determination constituted the basic problem, the court ruled that the suit was such a one as to fall within the provisions of § 666. *Rank v. United States,* supra, at pages 72-73.

It may well be that a general adjudication would require no more specific adjudication as to riparian and overlying rights than that which was here entered. As to the appropriative and prescriptive rights, however, the decree only purports to establish the rights of these plaintiffs as against the defendants. No priority is established save only that the rights are prior to those claimed by the defendant officials on behalf of the United States. As between the claimants themselves, their respective priorities are not established.

For these reasons, the suit at bar falls short of being one for a general adjudication. It is not such a suit as is contemplated by § 666. Consent to suit has not been conferred by the United States under that statute. The district court was without jurisdiction to join the United States and the United States must be dismissed from this proceeding.

The second jurisdictional question is presented by the contentions of defendant officials that this is essentially a suit against the United States; that the United States is an indispensable party and that the district court had no jurisdiction to entertain the suit in the absence of a waiver of sovereign immunity. In this respect they rely upon *Larson v. Domestic and Foreign Commerce Corporation,* 1949, 337 U.S. 682.

The suit against a government official is the traditional remedy for one aggrieved by governmental action in cases where there has been no waiver of sovereign immunity and action against the United States therefore is not available. In *Ickes v. Fox,* 1937, 300 U.S. 82, the Supreme Court dealt with such an action in the field of water rights and there held the United States not to be indispensable. The district court carefully considered this problem in an earlier proceeding in this litigation. *Rank v. Krug,* 1950, supra, footnote 2, and there held *Ickes v. Fox* to be controlling.

The *Fox* case, as does the case before us, involved a project of the Bureau of Reclamation. The plaintiffs had asserted that under reclamation laws they had acquired vested rights to the use of water from a source under the control of the Secretary; that the Secretary threatened to withhold a substantial portion of water unless the plaintiffs agreed to pay certain sums for further improvements undertaken by the Bureau. The court, at page 97, quoted as follows from *Philadelphia Company v. Stimson,* 1912, 223 U.S. 605, 619:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. * * * And in case of an injury threatened by his illegal action the officer cannot claim immunity from injunction process."

The court, in *Fox,* emphasized that the water rights of the plaintiffs had become vested and that the suit had been brought "to enjoin the Secretary of the Interior from enforcing an order the wrongful effect of which will be to deprive respondents of vested property rights * * *" (page 96). It held that under *Stimson* and other decisions of the court the suit was not one against the United States.

The nature of *Larson v. Domestic and Foreign Commerce Corporation,* supra, was, in that case, briefly stated by the court as follows, at page 684:

> "The complaint alleged that the Administration had sold certain surplus coal to the plaintiff; that the Administrator refused to deliver the coal but, on the contrary, had entered into a new contract to sell it to others. The prayer was for an injunction prohibiting the Administrator from selling or delivering the coal to anyone other than the plaintiff and for a declaration that the sale to the plaintiff was valid and the sale to the second purchaser invalid."

The problem presented is stated at pages 687-688 as follows:

> "* * * the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign. * * * The question becomes difficult and the area of controversy is entered when the suit is not one for damages but for specific relief: i.e., the recovery of specific property or monies or restraining the defendant officers' actions. In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign."

In dealing with this problem, the court stated at pages 689-690:

> "* * * where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient. And, since the jurisdiction of the court to hear the case may depend, as we have recently recognized, upon the decision which it ultimately reaches on the merits, it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies."

The court announced the rule at pages 701-702:

> "* * * the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void."

The court applied the rule to the facts, at page 703 as follows:

> "The very basis of the respondent's action is that the Administrator was an officer of the Government, validly appointed to administer its sales program and therefore authorized to enter, through his subordinates, into a binding contract concerning the sale of the Government's coal. There is no allegation of any statutory limitation on his powers as a sales agent. In the absence of such a limitation he, like any other sales agent, had the power and the duty to construe such contracts and to refuse delivery in cases in which he believed that the contract terms had not been complied with. His action in so doing in this case was therefore, within his authority even if, for purposes of decision here, we assume that his construction was wrong and that title to the coal had, in fact, passed to the respondent under the contract. There is no claim that his action constituted an unconstitutional taking. It was, therefore, inescapably the action of the United States and the effort to enjoin it must fail as an effort to enjoin the United States."

There can be little doubt that the opinion in *Larson* has limited the effect of *Ickes v. Fox* (as well as the many cases of like import discussed by Mr. Justice Frankfurter in his dissenting opinion in *Larson*, page 705 et seq.). Since *Larson* was handed down, courts have struggled with the problem of reconciliation. See Hart and Wechsler, The Federal Courts and The Federal System, page 1169 et seq.[6]

The task of reconciliation was undertaken, among other courts, by the Court of Appeals of the District of Columbia sitting en banc in *West Coast Exploration Co. v. McKay*, 1954, 213 F.2d 582.

That suit was brought to compel the Secretary of the Interior to issue a patent to a tract of land. The plaintiff asserted that the Secretary's refusal to do so was in violation of the Girard Act and constituted a substitution of the judgment of the Secretary for the will of Congress and thus was action beyond and in want of statutory power. The court ruled at page 594:

> "Accepting the assertion for the preliminary jurisdictional purpose only, as true, the action is not one against the United States but one to compel the Secretary of the Interior, himself, to perform a clear legal duty. Therefore, the Secretary,

[6]The authors of that text, at page 1175, in discussing Larson and the earlier opinions upon which it bore, observed that:
"• • • historically the most plainly permissible of all types of actions against government officials, federal or state, are those in which (a) the plaintiff seeks to enjoin conduct or threatened conduct which, if not officially justified, would constitute a common law tort, and (b) the relief sought can be given by simply directing the defendant to abstain from what he is doing or threatening to do."

> not the United States, is the necessary party defendant * * *."

The court distinguished the *Larson* case in the following language, at pages 594-595:

> "In brief, the action or inaction questioned in the *Larson* case was that of War Assets in the exercise of its authority in disposing of surplus property of the Government and in negotiating and performing contracts for such disposal. It was not charged in the complaint that War Assets had acted beyond that authority or unconstitutionally."

It construed the ruling of the Supreme Court, in *Larson* as based upon the fact that the complaint there had "charged erroneous action on the part of War Assets *within* its authority and not conduct beyond the power of War Assets or of unconstitutional character" (Page 595).

The case at bar, we feel, is distinguishable from *Larson* upon the same ground as was *West Coast*. Here, as in *Fox*, we are dealing with vested rights to the use of waters with which, it has been determined, these defendant officials are interfering. This dispute, so far as the project is concerned, is external rather than internal; the rights involved are wholly independent of the project. The case thus is distinguishable from those concerned with the enforcement of rights to water developed by the project and in this respect is more clearly distinguishable even than *Fox* itself.

As we shall discuss later, the United States is expressly authorized by statute to acquire, by the exercise of its power of eminent domain, such water rights as are felt to be necessary to accomplish the purposes of the Central Valley project. As to rights not so acquired, the duty of the Bureau and of these defendants is to respect them. The Reclamation Act, § 8, 43 U.S.C. §383, expressly so requires. *Supra*, footnote 3. Certainly no authority can be found by expression or implication for the officers of the Bureau, as an alternative to acquisition of these rights, to impair their value by operating this project in disregard of them.

As we shall discuss later, the defendants contend that these rights have been acquired by the United States through exercise of its power of eminent domain. If such were the case, defendants would, in the operation of the project, have been acting within their statutory authority. *Ogden River Water Users Association v. Weber Basin Water Conservancy*, 10 Cir., 238 F.2d 936. Our ruling upon this contention, *infra*, is that these rights have not been acquired by the United States. Such being the case, these defendants, in disregarding and impairing the vested rights of these plaintiffs, were acting beyond their statutory authority. The United States is not then an indispensable party to this proceeding.

What we have here held applies to interference with the vested rights of these plaintiffs. Upon another and special phase of this case relating to the rights of the city of Fresno, the contentions of the defendants have merit.

Fresno, as an overlying landowner, has vested rights to underground waters from a source fed by the San Joaquin. It has alleged a need for additional water for municipal purposes and that applications to appropriate water from the San Joaquin have been made pursuant to the provisions of the California Water Code. The processing of these applications has been held up pending the outcome of this case. In the meantime, Fresno has requested the Bureau to deliver water to the city at such time as the city provides itself with the means for receiving such water at Friant. Fresno alleges that the monetary demands of these defendants for the supplying of such water are excessive. The district court so found. It ruled that Fresno was entitled to "a declaratory judgment that any charge for water which may be made by the United States should be reasonable." It specified that reasonableness required that such charge should be "no more than the irrigation districts (supplied by Friant) are charged from time to time for Class 1 water." *Rank v. United States*, supra, at page 185.

In negotiating and contracting for the delivery of water from Friant Dam, defendant officials were acting within the scope of their statutory authority and were carrying out the duties imposed upon them by their official positions. It is their administrative function to determine the rates at which water shall be delivered. It cannot be said that their statutory authority is limited to the making of such determination as the courts may find to be reasonable. The complaint of Fresno in this regard is a complaint against the

United States and this dispute may not be entertained judicially without a waiver of sovereign immunity on the part of the United States.

Fresno protests that it has a preferred right to supplemental water under California's County of Origin and Watershed of Origin statutes. California Water Code §§ 10505, 11460-63.[7] The district court ruled that under these statutes the United States, prior to diverting San Joaquin water beyond the watershed or county of origin, must satisfy the needs of Fresno.

We may assume, without deciding, that these statutes apply to give Fresno a preferred position over defendant districts and over the United States as to the acquisition of appropriative rights. Fresno has, however, no vested right to command the services of the United States in receiving its waters. The terms

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[7] Water Code § 10505:

"No priority under this part shall be released nor assignment made of any application that will, in the judgment of the commission, deprive the county in which the water covered by the application originates of any such water necessary for the development of the county."

Water Code § 11460:

"In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."

Water Code § 11461:

"In no other way than by purchase or otherwise as provided in this part shall water rights of a watershed, area, or the inhabitants be impaired or curtailed by the department, but the

upon which the United States is willing to act in this respect remain an administrative decision which it is within the authority of the defendant officials to make.

As to that portion of the decree of the district court relating to the terms upon which Fresno is entitled to receive water from Friant Dam, the district court must be reversed.

The final jurisdictional contention of the defendants is that even though the United States may not itself be an indispensable party, the Secretary of the Interior is an indispensable superior officer and that the suit must therefore have been brought in the District of Columbia where service upon the Secretary might have been had. Their position in this respect is founded upon the proposition that by the decreed physical solution the court has required affirmative

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provisions of this article shall be strictly limited to the acts and proceedings of the department, as such, and shall not apply to any persons or state agencies."

Water Code § 11462:

"The provisions of this article shall not be so construed as to create any new property rights other than against the department as provided in this part or to require the department to furnish to any person without adequate compensation therefor any water made available by the construction of any works by the department."

Water Code § 11463:

"In the construction and operation by the department of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the department unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange."

action of these defendants and the expenditure of public funds; that this is a matter which concerns the Secretary and that such a decree may not be imposed upon these defendants, who are wholly without authority to comply in the absence of approval by the Secretary. Defendants thus seek to escape *Hynes v. Grimes Packing*, 1949, 337 U. S. 86, and *Williams v. Fanning*, 1947, 332 U. S. 490, which lay down the rules that a superior officer is indispensable only if the relief granted will require him to take affirmative action.

This contention misconceives the nature of the decree of physical solution. The decree does not require anyone to take action; it is simply a declaration of a means whereby those seeking to appropriate waters of a stream may do so. The position of the United States in relation to waters of the San Joaquin is not simply that of a prospective condemnor. It is also an applicant for appropriative rights under California law. So far as this case is concerned, the decree of physical solution tells these defendants (and the Bureau) that by this means they may secure the right to divert waters of the San Joaquin (which otherwise are not available for appropriation) without the necessity for condemnation of vested rights. A right to diversion by the specified means can coexist with existing vested rights.

The decree of physical solution is not then a detriment imposed upon the Bureau. It is a grant of right to the Bureau and a detriment or limitation upon the rights of the plaintiffs to the full natural flow of the

river. The judgment of the Bureau to accept the physical solution or, in the alternative, to reject it and resort to condemnation remains available.

We conclude that while the United States may not be joined as party defendant the district court has jurisdiction to entertain this suit against the defendant officials so far as concerns the vested rights of these plaintiffs; that in such respect neither the United States nor the Secretary of the Interior is an indispensable party.

III. The Issues Upon the Merits.

We proceed to a consideration of the issues which this appeal presents upon the merits. These issues relate, in greater part, to the contentions of the defendants that the United States has acquired (or can by physical seizure acquire) the water rights of these plaintiffs through its power of eminent domain and that their remedy is not through injunction but through an action to recover compensation in the Court of Claims under the Tucker Act. 28 U. S. C. §§ 1346, 1491.

The first question is whether the United States can acquire these rights at all through eminent domain. For three reasons plaintiffs contend that it cannot.

First, plaintiffs contend that there is no legislative authority to acquire by eminent domain the water rights on this stretch of the San Joaquin. They assert that legislative history demonstrates that Congress understood that no rights on this stretch of the river would be taken; that the project would deal only with

such waters as the United States could secure by appropriation under state law or by purchase.

We cannot agree. The statutes expressly grant power to acquire such rights as may be required. Legislative history is consistent. Indeed, the project could not operate without impairing, to some degree, the full natural flow of the river. In *Ivanhoe Irrigation District v. McCracken*, supra, footnote 2, dealing with the Central Valley Project, the Supreme Court stated at page 291:

> "If the rights held by the United States are insufficient, then it must acquire those necessary to carry on the projects * * *."

The City of Fresno contends that at least as to it there is no indication of congressional intent that its water rights should be subject to condemnation and thus become subordinated to irrigation purposes; that in absence of such an indication such an intent should not be presumed.

We cannot agree. The general congressional intent is clear: that where acquisition of property is necessary to permit the project to go forward, such property should be acquired. To require a showing that Congress had a particular piece of property in mind as a condition to governmental authority to condemn that piece of property would, in a project of this magnitude, wholly defeat the general congressional intent. If it be felt that in the public interest exceptions to the general authority to condemn should be made, these exceptions should be proposed to and made by Congress and not the courts.

What we have said applies as well to plaintiffs' second contention in this respect: that the only authority to condemn is as to wasteful uses of water such as those encountered in *United States v. Gerlach Livestock Co.*, supra, footnote 2. We find no justification for such a limitation upon the power of the United States to condemn.

The third contention of the plaintiffs is that California's County of Origin and Watershed of Origin statutes, supra, footnote 7 (which under § 8 of the Reclamation Act, supra, footnote 3, the United States is bound to respect), prevent diversion of waters of the San Joaquin beyond its watershed until the rights of these plaintiffs have been satisfied; that to condemn the rights of these plaintiffs for the purpose of such diversion is to disregard California law contrary to §8.

Assuming, without deciding, that California law gives these plaintiffs a preference over the defendant districts and the United States as to rights to appropriate surplus waters, it does not follow that such preferred rights cannot be taken by the United States. While a state can bestow property rights on its citizens which the United States must respect, it cannot take from the United States the power to acquire those rights. Accord: *Ivanhoe Irrigation District v. McCracken*, 1958, supra; *Federal Power Commission v. Oregon*, 1954, 349 U. S. 435.

We conclude that the United States has the power to acquire the rights of these plaintiffs through exercise of eminent domain.

The next question is whether the United States may acquire these rights by physical seizure. Plaintiffs contend, and the district court ruled, that the only manner by which the power of eminent domain may be exercised upon the Central Valley Project is through a judicial proceeding in condemnation; that rights may not be acquired by physical seizure of inverse condemnation.

This contention is based upon language contained in § 7 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 421:

> "That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States *by purchase or by condemnation under judicial process,* and to pay from the reclamation funds the sums which may be needed for that purpose * * *." (emphasis supplied.)

The Supreme Court, however, has recognized this section as authorizing a taking by physical seizure. In *United States v. Buffalo Pitts Company,* 1913, 234 U. S. 228, 233, it was stated:

> "Furthermore, the Government was authorized by § 7 * * * under which this improvement was being made to acquire any property necessary for the purpose and if need be to appropriate it."

Furthermore, in legislation specifically dealing with the Central Valley Project, Congress has used different and less restrictive language. The project was authorized and established under the provisions of the

Emergency Relief Appropriation Act of 1935, 49 Stat. 115, and the First Deficiency Appropriation Act, 1936, 49 Stat. 1622. By the Rivers and Harbors Act of 1937, 50 Stat. 850, the project was expressly reauthorized. There it is provided that the Secretary "*may acquire by proceedings in eminent domain or otherwise* all lands, rights-of-way, water rights or other property necessary for said purposes * * *." (Emphasis supplied.)

In our view, it cannot be said that Congress intended with respect to the Central Valley Project that exercise of the power of eminent domain was to be exclusively through judicial proceedings and that physical seizure and inverse condemnation were not to be available.

Our views are reinforced by the result in *Gerlach Livestock Company v. United States,* Court of Claims, 1948, affirmed in *United States v. Gerlach Livestock Company,* supra, footnote 2. It was recognized in that case that certain riparian rights on the lower San Joaquin had been acquired by the United States through seizure and it was held that the plaintiffs were entitled to compensation therefor. Further, in *Ivanhoe Irrigation District v. McCracken,* supra, at page 291, the Supreme Court recognized the power of the United States to acquire rights, paying compensation therefor, "either through condemnation or, if already taken, through action of the owners in the courts."

We conclude that the District Court was in error in ruling that the only means, other than purchase, by

which the United States may acquire title to water rights for the Central Valley Project is through judicial proceedings in condemnation.

Our rulings thus far have, we feel, reached the heart of this dispute. The United States, we have determined, has power to acquire the water rights in question and may do so by physical seizure. It may thus, by seizure, impose upon these plaintiffs the very restrictions and adjustments as to amounts and flows and methods of diversion that it sought to secure by contract, leaving the matter of compensation, in continued absence of agreement, to be fixed in the Court of Claims.

This does not dispose of the appeal, however. The defendants contend that the rights of the plaintiffs have already been seized. This contention requires consideration of the manner in which water rights may be taken by physical seizure.

Defendants first contend that plaintiffs' rights were seized in their entirety on October 20, 1941, upon which date the impounding of water at Friant Dam commenced. For this contention they rely heavily upon *Gerlach*, supra, as establishing the law with respect to this project. The Court of Claims there held, 1948, 111 Ct. Cl. 1, 87, 76 F.Supp. 87, 98, that taking by the United States of the rights there in question occurred not later than the specified date. Defendants insist that by that holding, affirmed by the Supreme Court, it has been established that on October 20, 1941, the rights of these plaintiffs were in their entirety seized by the United States through the action of the

defendants in commencing the impounding of water at Friant.

The rights in dispute in *Gerlach* were rights riparian to what was designated as "uncontrolled grasslands"—lands which were not irrigated but which secured their river water only through the uncontrolled flooding of the river at high stages. With reference to the time of the taking of these rights, the Court of Claims stated, Ct. Cl., supra, at page 80, F.Supp., supra, at page 97:

> "That time, it would seem, comes whenever the defendant's intent to take has been definitely asserted and it begins to carry out that intent. So long as it is conjectural whether or not defendant will actually take plaintiff's property, a taking has not occurred, but when conjecture ripens into a definitely asserted purpose and steps are taken to carry out that purpose, the taking may be said to have occurred.
>
> "In the case at bar there can be no doubt that the defendant intended to deprive plaintiffs of whatever water rights they had in their lands."

This is not the case with the rights of these plaintiffs. In *Gerlach* there could be no doubt but that flood waters would be captured at Friant in their entirety. There could be no dispute but that once impounding commenced the rights of uncontrolled grasslands to enjoy flood waters had been wholly taken. The enjoyment of these rights was completely inconsistent with project purposes from the very outset.

In the case before us, the operation of the dam is wholly consistent with a continuing recognition of the

rights of these plaintiffs to make reasonable use of the waters of the San Joaquin. The pleadings of these defendants, as we have heretofore quoted them, footnote 5, state that the Central Valley Project, as it is contemplated, will not deprive the plaintiffs of a reasonable use of water. These defendants prayed a decree determining that the riparian lands of the plaintiffs are entitled to receive water. Further, they prayed for a physical solution which would respect the continuing enjoyment of these rights.[8]

The defendants assert that legislative history and reports to Congress respecting the purpose and nature of the project demonstrate an intent that all water of the San Joaquin flowing at Friant would be impounded and diverted. They point to language in the feasibility report (set forth as a supplement to *Rank*

[8]The district court was undoubtedly disturbed by apparent inconsistencies in the position taken by the Secretary from time to time as this litigation progressed. On March 30, 1953, in response to a request from the district judge that the Secretary clarify his position, a letter was written by the Secretary to the Attorney General expressing his "administrative intent with respect to the operation of the Central Valley project insofar as it relates to the Friant-to-Gravelly Ford reach of the San Joaquin River." Here again it is specified that:

"• • • the Department will release from Friant Reservoir into the bed of the river a sufficient quantity of water (1) to meet all valid legal requirements for the reasonable and beneficial use of water, both surface and underground, by reasonable methods of diversion and reasonable methods of use in that area, and (2) to provide, in addition thereto, a continuous live stream flowing at a rate of not less than five cubic feet per second at specified control points throughout the Friant-to-Gravelly Ford area, the last one to be at a point approximately one-half mile below the head of the Gravelly Ford Canal."

Later, however, it is stated by the Secretary:

"I want to emphasize that the foregoing plan of operation of Friant Dam and Reservoir is an administrative one, voluntarily assumed and voluntarily to be executed."

v. Krug, D.C.S.D. Cal., 1950, 90 F.Supp. 773, 824) to the effect that the project would permit "*the entire flow* of the San Joaquin River to be regulated in Friant Reservoir * * * and to be utilized in the southern San Joaquin Valley * * *." (Emphasis supplied.) They point to Finding No. 35 of the Court of Claims in the *Gerlach* case:

> "Defendant's plan, as modified, contemplated that the United States should eventually store and divert to non-riparian use all the waters of the San Joaquin River flowing at Friant, except for occasional spills."

They point to language of the Supreme Court in *Gerlach,* at page 729:

> "A cost of refreshing this great expanse of semi-arid land (that supplied with project water by the United States from Friant) is that, except for occasional spills, only a dry riverbed will cross the plain below the dam."

The fact is, however, that the river below Friant will not be dried up. The United States is under a contractual obligation to numerous landowners to maintain a live stream. The United States has not then by the construction of the dam and the impounding of waters seized in their entirety the rights of these plaintiffs.

Appellants next contend that the rights of these plaintiffs have been taken by the manner in which the dam has been operated. This taking, they assert, was a partial taking: a taking to the extent that injury has been sustained.

While the river will not be dried up below Friant, there is no doubt that the project from the outset contemplated that the full natural flow would no longer pass Friant. There is no question but that the manner in which the dam has been operated by the Bureau has not permitted such flow. By operation of the dam, then, defendants may, indeed, have seized the physical corpus of waters which plaintiffs have a right to put to use. The question is whether such a taking, assuming it have occurred, constitutes a seizure of the water rights of these plaintiffs or, on the other hand, constitutes mere trespass upon them.

The peculiar characteristics of a water right as property are such as to demonstrate that seizure of such a right requires something more of a condemnor than would be necessary in the seizure of other types of property. This case is thus distinguishable from *United States v. Dow*, 1958, 357 U.S. 17, and *Hurley v. Kincaid*, 1932, 285 U.S. 95.

Plaintiffs' rights give them no title to the corpus of the water. The rights are usufructuary; they are rights to the use of water only. An isolated instance in which a certain amount of water has been taken would, of course, constitute a taking of the right to the use of that water by another. However, it would not necessarily constitute any attack upon that person's right to a continuing flow in a specified amount and to put water in a specified amount to beneficial use in the future. By virtue of the peculiar nature of the water right as property, a seizure of such right has important prospective as well as retrospective as-

pects. It does not relate solely to what has been taken in the past or is being taken in the present. It relates as well to the right to receive in the future. A condemnor cannot seize by saying only: "I hereby take X gallons of water." To effect a seizure of water rights, he must by word or action unequivocally say: "I hereby take your right to receive X gallons in the future."[9]

To illustrate the equivocal character of a taking of water, standing alone, we may suppose a case in which A has a right to 100 inches and the government during the month of August so regulates the flow of the source that A received only 90 inches, the balance being diverted by the government to its own use. What was the situation when this taking commenced? (1) Had A's right been seized in its entirety; or (2) had it been seized to the extent of 10 inches with the result that thereafter A had a right to receive only 90 inches; or (3) had it been seized to the extent of 10 inches in August, reverting to 100 inches in September?

If one's sole remedy for such a "taking" is to be an action for compensation in the Court of Claims, he must know what of his right has been taken: as to amounts, as to flows, as to methods of diversion. And he must have this knowledge not after the fact but at the

[9]"The damages claimed for diversion of a natural stream must be for the injury to plaintiff's enterprise consequent to the loss of the flow and the use of the water, not for the value of the water at so much per inch or gallon since plaintiff does not own the corpus of the water, but a usufruct." 1 Wiel, Water Rights in the Western States (3d Ed.), 1912 at page 699.

time the interference occurs. Otherwise, the interference is more consistent with a transitory trespass upon his water rights than with a physical seizure of them. If, in the hypothetical case, the government on August 1 had no plan other than to take, day by day, whatever it felt was necessary, there would have been no seizure of water rights. There would, it is true, have been a taking of property as to which A had the right of use. There would have been compensable damage as to such taking. The water right would remain, however. While an isolated instance of a taking of water would not reflect upon a user's water right, still the taking can progress to a point where the right becomes clouded by apparent challenge. A casual day by day taking under these circumstances constitutes day to day trespass upon the water rights.

That there is a remedy in damages for such interference after the fact of the interference is not sufficient. The cloud cast prospectively on the water right by the assertion of a power to take creates a present injury above what has been suffered by the interference itself—a present loss in property value which cannot be compensated until it can be measured. Whether this trespass sounds in tort or is, as to the compensable injury, an actual taking of property is, we feel, an academic question not material to this case. In either event, the act is prospective impairment of the water right for which there is no remedy by compensation.

In an exercise of its power of eminent domain, then, the United States must commit itself as to what is

taken and as to what remains untaken. That which remains untaken and continues vested in the owner, the officers of the United States must continue to respect.

In the case at bar, the operation of Friant Dam was not of such a character as to notify these plaintiffs as to the extent of the seizure of their rights. Nor was it accompanied by any sufficiently definite uttered or written notification.[10]

We conclude that the water rights of these plaintiffs have not been acquired by the United States through exercise of its power of eminent domain.

Our ruling in this respect and the reasons stated therefor dispose as well of defendants' contention that certain of these plaintiffs have waived their rights to injunction and to deny a seizure of their water rights by having already filed actions under the Tucker Act to recover for damages already incurred. The contention that they have incurred compensable injury from acts of the defendants is not inconsistent with a con-

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[10]Defendants assert that plaintiffs had ample notice through the manner in which Friant Dam was operated after July 1, 1953. Prior to that date the operation of the dam had been controlled by court order requiring release of at least 400 cubic feet per second. Upon lifting of this order, the flow was cut. The record shows a flow of 170 cubic feet per second in June, 1954; of 125 in September, 1954; of 145 in June, 1955; of 133 in September, 1955. Defendants assert that this manner of operation together with the statement of administrative intent contained in the Secretary's letter of March 30, 1953, to the Attorney General (see footnote 8), was sufficient to notify plaintiffs as to what portion of their rights was being taken.

We cannot agree. Without more specific commitment on the part of the Secretary, we cannot see how these plaintiffs could possibly anticipate what would occur next.

tention that their water rights have not been seized and must be respected.

Finally, defendants contend that, apart from all questions of eminent domain, it should not be available to these plaintiffs to interfere by injunction with the public use which the Central Valley Project represents. They protest in effect: "A claim for damages we can meet, but we cannot live with an injunction." They quote from the Supreme Court in *Larson, supra*, at page 704, as follows:

> "* * * it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right."

The question is as to the extent of freedom which the Bureau should enjoy in operating Friant Dam for project purposes. We are concerned here with a balancing of the public interest which this project represents and the private interests represented by these plaintiffs. We cannot say that the district court was in error in determining the balance to fall in favor of the plaintiffs.

Others have, in operations of this sort, lived successfully with such an injunction as this. The com-

pulsion to respect vested rights has not been felt to halt such projects in their tracks. If defendants are right in their contentions, then Friant Dam can be operated without regard to the rights of those downstream (save the right to compensation after the fact of injury) and at the whim and caprice of Bureau officials giving full consideration only to those to whom they sell project water. Any respect accorded to the rights or needs of those downstream would, as the Secretary stated in his letter to the Attorney General, supra, footnote 8, be voluntarily assumed and voluntarily executed.

The question is whether these plaintiffs should be required to live with such free governmental control. A water right with no assurance of its peaceful enjoyment is worth little to a farmer whose very existence is dependent upon the predictability of his future water supply. For this reason the injunction is one of the traditional forms taken for the judicial establishment of water rights.

Defendants protest that for the district court to impose upon them the court's physical solution is for the court to substitute its judgment for that of the Bureau contrary to congressional intent in establishing the project. They assert that we should not tolerate such judicial intrusion into this specialized executive area.

We have already pointed out that defendants misconceive the nature of the physical solution. Their right to substitute their own solution and proceed in accordance with their own plans is still available to

them provided the necessities for acquisition by eminent domain are met as to this now judicially established right.

To summarize: These plaintiffs are not attempting, through the device of an action against these officials, to get back from the United States something that has been taken from them or to compel the United States to do something for their benefit or (as in *Hurley v. Kincaid,* 1931, 285 U.S. 95) to enjoin the United States from exercising its power of eminent domain. The decree simply tells these officials that until the rights of the plaintiffs *have* been acquired by the United States, it is the statutory duty of these officials in the operation of Friant Dam to respect those rights.

Defendants protest that even though an injunction be proper, there is no occasion to require the full natural flow of the river; that their operations of Friant Dam demonstrate that the riparian owners can comfortably get along on less. This may be so as to the riparian owners. There is evidence, however, that Fresno's rights cannot be met save by the full natural flow or an adequate simulation of such flow.

We conclude that the district court should not be reversed as to the injunctive aspect of its decree.

IV. Decision.

Save in the respects here specified, the judgment of the district court is affirmed. As to the joinder of the United States the district court is reversed. As to the rights of the City of Fresno, the district court is re-

versed in the respect specified in our opinion. This matter is remanded with instructions that the United States be dismissed as defendant and that the decree of the district court be vacated and set aside insofar as it relates to the terms upon which the City of Fresno is entitled to receive water from the United States at Friant Dam. Each party will bear its respective costs incurred on this appeal.

(Endorsed) Opinion Filed March 31, 1961.

Frank H. Schmid, Clerk.

United States Court of Appeals for the Ninth Circuit

No. 15840

State of California, United States of America, et al.,
Appellants,

v.

Everett G. Rank, et al.,
Appellees.

Appeal from the United States District Court for the Southern District of California, Northern Division.

This Cause came on to be heard on the Transcript of Record from the United States District Court for the Southern District of California, Northern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed save in the respects here specified, as to joinder of the United States the District Court is reversed, as to the rights of the City of Fresno, the District Court is reversed as to that portion of the decree relating to the terms upon which Fresno is entitled to receive water from Friant Dam, and this matter is remanded to the said District Court with instructions that the United States be dismissed as de-

fendant, and that the said decree be vacated and set aside insofar as it relates to the terms upon which the City of F(r)esno is entitled to receive water from the United States at Friant Dam; each party will bear its respective costs incurred on this appeal.

(Endorsed) Judgment Filed and entered March 31, 1961.

Frank H. Schmid, Clerk.

United States Court of Appeals for the Ninth Circuit

No. 15840

State of California, United States of America, et al., Appellants,

v.

Everett G. Rank, et al., Appellees.

Aug. 14, 1961

Before HAMLIN and MERRILL, Circuit Judges, and POWELL, District Judge

Upon petitions for rehearing filed herein by the State of California, the City of Fresno and the San Joaquin Municipal Utility District,

IT IS ORDERED:

(1) The opinion heretofore filed herein is corrected in the following respects:

(a) The following language is stricken from page 4 of the slipsheet opinion as printed by this court at the end of the first full paragraph: "The processing of these applications has been halted pending the outcome of this case."

(b) The following language is stricken from the third full subparagraph on page 18 of the

opinion: "The processing of these applications has been held up pending the outcome of this case."

(c) The following is added to footnote 7, page 19, of the opinion:

Water Code § 11463:

"*Limitations.* The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part."

(2) The petition of the City of Fresno is denied.

(3) The petition of the State of California is granted. Briefs shall be filed within the times prescribed by Rule 18 of the Rules of this court, including an opening brief by petitioner unless it elects to stand upon its petition and waive further opening statement.

(4) The petition of San Joaquin Municipal Utility District is granted subject to the same provision with reference to briefs.

(Endorsed) Order on Rehearing Fled Aug. 14, 1961.

Frank H. Schmid, Clerk.

United States Court of Appeals for the Ninth Circuit

No. 15840

State of California, United States of America, et al.,
Appellants,

v.

Everett G. Rank, et al.,
Appellees.

August 14, 1961

Upon Petition for Rehearing

Before HAMLIN and MERRILL, Circuit Judges, and POWELL, District Judge

MERRILL, Circuit Judge

The City of Fresno has petitioned this court for rehearing. By order entered this day rehearing has been denied. In two respects, however, we feel that an opinion may serve a clarifying purpose.

I

Fresno asks that this court require the trial court to bring in as additional parties those holders of prescriptive or appropriative rights not now joined and points out in support that in excess of one million dollars has already been expended in the trial of the present action.

It is not clear to us what purpose would be accomplished by such joinder. It would not, standing alone, as we discussed in our opinion, convert this action into a general adjudication of a stream system. We decline to enter such an order.

We do appreciate the fact that much time, effort and cost have been expended on this litigation and that the disputes have expanded far beyond the original issues. It is quite possible that further useful ends can be served by this proceeding from time to time in the adjudication of specific rights or otherwise. If so, the continuing jurisdiction of the district court may provide a forum for consideration of such new matter and it is not our present purpose anticipatorily to limit the jurisdiction of the district court in any such respect. So far as concerns the issues of this appeal, however, we find no occasion to delay our judgment pending any further district court consideration.

II

Fresno has again, and vigorously, presented its contention that California's county and watershed of origin statutes are, under § 8 of the Reclamation Act, binding upon the United States and preclude the diversion by these defendants of water of which Fresno has present need.

It would appear either that we do not understand what it is that Fresno seeks in this respect or that Fresno does not appreciate the distinction we draw between vested rights to natural flow and rights to

project water: Hence the following elaboration upon our opinion.

It may well be that Fresno, under California law, has preferred rights to additional natural flow. If and when such rights have been established in accordance with state law, Fresno may be able effectively to protest the impounding of waters by these defendants in contravention of such rights. But this is speculation upon future events and future issues and decision must await the occurrence and the dispute.

The judgment of the district court, which we reversed in this respect and to which Fresno's petition for rehearing is directed, did not appear to relate to Fresno's right to natural flow, however. It appeared to relate to Fresno's right to project water. If Fresno is to have such water or is to enjoy the benefits of Friant storage or the delivery service of the United States, the terms upon which it may do so are not (for the reasons expressed in our opinion) appropriate issues in this section against the individual officers of the bureau.

(Endorsed) Order on Rehearing Filed Aug. 14, 1961.

Frank H. Schmid, Clerk.

The Secretary of the Interior
Washington
November 26, 1935

"The President
The White House

"My Dear Mr. President:

"The Supreme Court of the United States in the Parker Dam decision *United States v. State of Arizona,* 295 U. S. 174, 55 S. CT. 666, 79 L. Ed. 1371 indicated that Section 4 of the Act of June 25, 1910 (36 Stat. 835), is applicable to irrigation projects constructed under the National Industrial Recovery Act and this report on the Central Valley project, California, is made to you under said statute of 1910 and under subsection B of Section 4 of the Act of December 5, 1924 (43 Stat. 702).

"Section 4 of the Act of June 25, 1910 (36 Stat. 835), provides, in effect, that after the date of that act no irrigation project to be constructed under the Act of June 17, 1902, (32 Stat. 388), and acts amendatory thereof or supplementary thereto, shall have been recommended by the Secretary of the Interior and approved by the direct order of the President.

"Subsection B, Section 4, Act of December 5, 1924 (43 Stat. 702) provides as follows:

" 'That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construc-

tion, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States.'

"GENERAL DESCRIPTION OF PROJECT

"The Central Valley project embodies a plan for the conservation, regulation, distribution and utilization of the water resources of the Sacramento and San Joaquin Rivers to provide urgently needed water supplies for existing agricultural, industrial and municipal developments in the Sacramento and San Joaquin valleys and upper San Francisco Bay region which contain 3,000,000 acres of settled, irrigated and productive land, and a population of 90,000 persons. In addition to providing new water supplies to meet serious problems of water shortage, the project contemplates the restoration of commercial navigation on the upper Sacramento River, increased flood protection for the valley lands, and incidentally the generation of about a billion and a half kilowatt hours annually of hydroelectric energy.

"The key unit of the project is Kennett Reservoir on the Sacramento River. A dam 420 feet high will regulate floods and store three million acre-feet of water. Water released from the reservoir, after generating hydroelectric power, will flow down the Sacramento River, maintaining adequate depths for navi-

gation and furnishing ample supplies for irrigation and municipal and industrial use along the main river and in the fertile delta region of the Sacramento and San Joaquin Rivers. Intrusion of salt water from the bay into the delta channels—a frequent occurrence in recent years causing substantial loss in crops and threatening destruction of productivity—will be prevented by the released waters. In addition water supplies will be made available in the delta channels for various uses in the nearby upper San Francisco Bay area, and for utilization in the San Joaquin Valley. Conduits to carry the supplies to these areas are provided. The supply for the San Joaquin Valley will be conveyed up the San Joaquin River through a series of pumping plants and intervening natural and artificial channels a distance of 150 miles lifting the water to an elevation of 160 feet above sea level. This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated in Friant Reservoir—the second storage unit of the project—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south.

"The cost of the project, estimated at $170,000,000, will be met by revenues from the sale of water and power.

"WATER SUPPLY

"The sources of water supply for the project are the Sacramento and San Joaquin Rivers and their tributaries. The State of California, pursuant to acts of the State Legislature has filed notices of appropriation on the principal streams, which are in good standing. Water supplies studies made by the Department of Public Works of California, U. S. War Department and the U. S. Bureau of Reclamation, indicate on the basis of available data that the works of the project will provide an adequate water supply for all purposes.

"ENGINEERING FEATURES

"The principal engineering features of the project are as follows:

"Kennett Dam Unit—the Kennett reservoir, the key unit of the project, is located in the Sacramento River near Redding in Shasta County. The dam will be 420 feet high and store 3,000,000 acre-feet of water. A 175,000 k. v. a. power plant will be located below the dam. A regulating afterbay with a 50,000 k. v. a. power plant will be constructed below the Kennett Dam. From the power plants a 200 mile power transmission line will extend to a main distributing substation near Antioch or Suisun Bay.

"Contra Costa Conduit--A canal, capacity 120 second feet, with pumping plants, will extend westerly from the San Joaquin delta for 50 miles through Contra Costa County to supply municipal, industrial and agricultural water requirements.

"San Joaquin Pumping System—The works for this pumping system will comprise a dam and other works in Sacramento delta to divert stored water from Kennett reservoir through a channel into San Joaquin delta for salinity control, irrigation and other purposes; dredging of existing channels in the San Joaquin delta; five dams and pumping plants on San Joaquin River to mouth of Merced River; and four pumping plants and 65 miles of canal on the westerly side of San Joaquin Valley which will deliver water to Mendota Weir on San Joaquin River, elevation 160 feet. These works will be capable of furnishing a substituted supply of 1,000,000 acre-feet to 285,000 acres of land now irrigated from San Joaquin River.

"Friant Reservoir—A dam, 250 feet high, will be constructed on San Joaquin River, which will store 400,000 acre-feet of water which will permit the diversion of San Joaquin River water southward at elevation 467 feet. One and one-half million acre-feet annually on the average will be available for transmission from the reservoir through means of the San Joaquin River Pumping System and the purchase of water rights in the San Joaquin River.

"Friant-Kern Canal—The Friant-Kern Canal will extend from Friant Reservoir to Kern River, a distance of 157 miles and will be capable of serving an area of 1,000,000 acres of developed land.

"Madera Canal—The Madera Canal, maximum capacity 1500 second-feet, will extend from Friant reservoir to Chowchilla River, a distance of 35 miles and will be capable of furnishing irrigation water to an area of 140,000 acres.

"ESTIMATED COST OF PROJECT

Kennett dam, reservoir and power plants	$ 84,000,000
Kennett transmission line and substation	14,000,000
Contra Costa Conduit	2,500,000
San Joaquin Pumping System	19,000,000
Friant dam and reservoir	14,000,000
Friant-Kern Canal	26,000,000
Madera Canal	3,000,000
Rights of way, water rights and general expenses	8,000,000
TOTAL	$170,000,000

"First Year Construction Program.

"Under date of September 10, 1935, you approved an allocation of $20,000,000 for the Central Valley Project, which amount was later reduced to $15,000,000. Construction on the following units is recommended for the first year:

"Kennett Reservoir Unit Contra Costa Conduit" Friant Dam and Canals.

"An amount of $15,000,000 can be efficiently and economically expended on the foregoing units during the first year of construction.

"Adaptability of Land for Irrigation,

"CROP PRODUCTION AND SETTLEMENT

"The climate is favorable and the soil, if water is available, is adaptable to the production of a wide

variety of crops. The principal crops now raised in the San Joaquin Valley are citrus and deciduous fruits, grapes, alfalfa, cotton, nuts and figs; in the Delta, asparagus, celery, potatoes as well as deciduous fruits; and in the Sacramento Valley there is a heavy production of rice in addition to other grains and deciduous fruits.

"The valley is highly developed. The lands are of high value and produce large returns. With an attractive climate, fertile soil and stable markets, water is the one remaining necessity to prosperous, successful agricultural industry. It has been highly successful and supports a large farm population. Much of the fruit is shipped to eastern markets but many other items, such as the products of dairying, are marketed within the state and reduce the quantities, imported into the state. Products are largely non-competitive with other sections of the country, since many of them, such as nuts, figs, raisins, asparagus are produced almost wholly in California.

"Transportation facilities are excellent. These include railroads and improved highways leading to the Metropolitan center of Los Angeles and San Francisco and to eastern markets.

"The project is not designed for bringing new lands into cultivation, but for the maintenance of existing agricultural development and existing civilization of a high type. Any increase in irrigated land will be small and will come into being slowly over a long period of time. Part of the water supply is to be obtained by the purchase of water now used for the irri-

gation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land, as compared to a small and gradual increase of irrigated land.

"SOCIAL AND ECONOMIC VALUES.

"The economic values of the project are of great magnitude. The project will not bring into production new agricultural areas but will maintain present values and civilization. Of the 3,000,000 acres now irrigated, 1,000,000 face acute water shortage, and abandonment is proceeding rapidly. The values in jeopardy are large, as without water, not only will lands dry up but communities will vanish and whole sections return to desert, as is now occurring in the San Joaquin Valley. A share of the loss will be suffered by persons not residing in the areas directly affected.

"Control of salinity in the delta of the two rivers near Sacramento is part of the agricultural maintenance phase of the project. Here 400,000 irrigated acres with an annual crop value of $30,000,000 are menaced by salt water from upper San Francisco Bay. Some abandonment has occurred and the whole area is endangered. In this same general area is a large industrial section which is also short of water by reason of increasing salinity. Here 100 industrial plants produce annually $100,000,000 value of manufactured products, and while not facing extinction, are suffering damage and expense from lack of water.

"Navigation on the Sacramento River, one of the important waterways of the nation, has been greatly

damaged by low water, navigation having been practically abandoned above Sacramento in the summer season. The national navigation and flood values of the project have been found by the War Department to be $12,000,000, and the recently enacted Rivers and Harbors Bill (Public No. 409, 74th Congress), by reference to the War Department report approves the project and authorizes the appropriation of $12,000,000 for it.

"A large power house at the main storage dam will produce nearly a billion and a half kilowatt hours of electric energy annually, which will be sold at less than existing rates, thereby benefiting power users and at the same time producing a large revenue, which will go toward the repayment of the construction costs.

"PROBABLE RETURN TO RECLAMATION FUND OF COST OF CONSTRUCTION.

"The next declaration required is that the cost of construction will probably be returned to the Federal Government. This is interpreted to mean that it will be returned within forty years from the time the Secretary issues public notice that water is available from the project works. The estimated cost of construction is $170,000,000 and the annual cost, including repayment of all other charges is $7,500,000. It is estimated that annual revenues from the sale of water and of electric power will be sufficient to cover these charges. The favorable conditions heretofore recited justify the belief that the project will return its cost.

"I find that the project is feasible from engineering, agricultural and financial standpoints, that it is adaptable for settlement and farm homes, that the estimated construction cost is adequate and that the anticipated revenues will be sufficient to return the cost to the United States.

"The Commissioner of Reclamation has approved and recommended the construction of the project. I therefore recommend the approval of the Central Valley development as a Federal reclamation project.

"Sincerely yours,
"(Sgd.) Harold L. Ickes,
"Secretary of the Interior.

"Approved: Dec. 2, 1935.
"Franklin D. Roosevelt.
"President."

"Sec. 2. That the $12,000,000 recommended for expenditure for a part of the Central Valley project, California, in accordance with the plans set forth in Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress, and adopted and authorized by the provisions of section 1 of the Act of August 30, 1935 (49 Stat. 1028 at 1038), entitled 'An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' shall, when appropriated, be available for expenditure in accordance with the said plans by the Secretary of the Interior instead of the Secretary of War: *Provided*, That the transfer of authority from the Secretary of War to the Secretary

of the Interior shall not render the expenditure of this fund reimbursable under the reclamation law: *Provided further,* That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purpose of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided further,* That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in em-

inent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: *And provided further,* That the said dam and reservoirs shall be used, first for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power.

Act of August 26, 1937 (50 Stat. 844, 850)

"Subsec. B. That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States."

Act of December 5, 1924 (43 Stat. 672, 702, Section 4, Subsec. B.)

"Sec. 2. Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs."

Act of October 13, 14, 1949 (63 Stat. 852, 853)

"Sec. 208. (a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit."

Act of July 10, 1952 (66 Stat. 518, 560, Sec. 208 (a))

"Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder; and the Secretary of the Interior, in carrying out the provisions of this Act shall proceed in conformity with such laws. * * *"

Act of June 17, 1902 (32 Stat. 388, 390; 43 U. S. C. 391)

"*State use and control of water.* It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection. (Stats. 1943, c. 368, p. 1606, Section 104.)"

California Water Code Section 104

"*Highest uses of water; domestic; irrigation.* It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation. (Stats. 1943, c. 368, p. 1606, Section 106.)"

California Water Code Section 106

"*Municipal priority.* The application for a permit by a municipality for the use of water for the municipality or the inhabitants thereof for domestic purposes shall be considered first in right, irrespective of whether it is first in time. (Stats. 1943, c. 368, p. 1623, Section 1460.)"

California Water Code Section 1460

"*Applications; filing; formalities; priority; diligence.* The Department of Finance shall make and file applications for any water which in its judgment is or may be required in the development and completion of the whole or any part of a general or coordinated plan looking toward the development, utilization, or conservation of the water resources of the State.

Any application filed pursuant to this part shall be made and filed pursuant to Part 2 of Division 2 of this code and the rules and regulations of the State Engineer relating to the appropriation of water insofar as applicable thereto.

Applications filed pursuant to this part shall have priority, as of the date of filing, over any application made and filed subsequent thereto. Until October 1, 1959, or such later date as may be prescribed by further legislative enactment, the statutory requirements of said Part 2 of Division 2 relating to diligence shall not apply to applications filed under this part, except as otherwise provided in Section 10504. (Added Stats. 1943, c. 370, p. 1896, as amended Stats. 1953, c. 1522, p. 3184, Section 1; Stats. 1955, c. 1248, p. 2282, Section 1.)"

California Water Code Section 10500

"*Release and assignment of priority; assignee defined.* The Department of Finance may release from priority or assign any portion of any appropriation filed by it under this part when the release or assignment is for the purpose of development not in conflict with such general or coordinated plan. The assignee of any such application, whether heretofore or hereafter assigned, is subject to all the requirements of diligence as provided in Part 2 of Division 2 of this code. 'Assignee' as used herein includes, but is not limited to, state agencies, commissions and departments, and the United States of America or any of its departments or agencies. (Added Stats. 1943, c. 370,

p. 1896, as amended Stats. 1951, c. 445, p. 1458, Section 3, operative October 1, 1951.)"

California Water Code Section 10504

"*Restrictions on release or assignment.* No priority under this part shall be released nor assignment made of any appropriation that will, in the judgment of the Department of Finance, deprive the county in which the appropriated water originates of any such water necessary for the development of the county. (Added Stats. 1943, c. 370, p. 1896.)"

California Water Code Section 10505

"*Limitations.* The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part. (Added Stats. 1951, c. 1325, p. 3216, Section 1.)"

California Water Code Section 11128

"*Prior right to watershed water.* In the construction and operation by the authority of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to

all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein. (Added Stats. 1943, c. 370, p. 1896.)"

California Water Code Section 11460

"*Exchange of watershed water.* In the construction and operation by the authority of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the authority unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange. (Added Stats. 1943, c. 370, p. 1896.)"

California Water Code Section 11463

"Policy guiding action on applications. In acting upon applications to appropriate water the department shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water. (Stats. 1943, c. 368, p. 1616, Section 1254.)"

California Water Code Section 1254

CONSTITUTION OF THE STATE OF CALIFORNIA

ARTICLE XIV

Sec. 3. Conservation of water resources; restriction of riparian rights

"Sec. 3. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably repuired for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any ap-

propriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained. (Added Nov. 6, 1928.)"